(28,500)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 545.

TAKUJI YAMASHITA AND CHARLES HIO KONO, PETITIONERS,

vs.

J. GRANT HINKLE, AS SECRETARY OF STATE OF THE STATE OF WASHINGTON.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 29, 1921.

1 In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO, Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington, Defendant.

Notice of Hearing of Application.

[Stamp:] Filed in Supreme Court of Washington May 16, 1921. C. S. Reinhart, Clerk. F. S. G.

To the above-named defendant, J. Grant Hinkle, as secretary of State of the State of Washington:

You are hereby notified that the plaintiffs will call the attached application for writ of mandate up for hearing before the Supreme Court of the State of Washington at its court room in the temple of justice in the City of Olympia, Washington, upon the sitting of the said court in its morning session on the 20th day of May, 1921, or as soon thereafter as the said matter can be heard.

(Signed) SHANK, BELT & FAIRBROOK,
Attorneys for said Plaintiffs.

2 In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO, Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington, Defendant.

Application for Writ of Mandate.

[Stamp:] Filed in Supreme Court of Washington May 14, 1921. C. S. Reinhart, Clerk. F. S. G.

Comes now Takuji Yamashita and Charles Hio Kono and make application herein for a writ of mandate directed to the above named defendant J. Grant Hinkle, as secretary of state of the State of Washington, requiring the said J. Grant Hinkle to receive and file the articles of incorporation of Japanese Real Estate Holding Company, heretofore tendered to the said defendant by the said plaintiffs as set forth in the accompanying affidavit. This application is based

upon the affidavit hereto attached, which is hereby referred to and made a part of this application.

(Signed) SHANK, BELT & FAIRBROOK,
Attorneys for said Plaintiffs.

3 In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO, Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington, Defendant.

Affidavit in Support of Application for Writ of Mandate.

STATE OF WASHINGTON,
County of King, ss:

Takuji Yamashita, being first duly sworn, on oath deposes and says:

I am one of the above named plaintiffs and make this affidavit on behalf of myself and my above named co-plaintiff for the purpose of obtaining a writ of mandate out of this court directed to the above named defendant J. Grant Hinkle, as secretary of state of the State of Washington, requiring the said defendant to receive and file articles of incorporation of Japanese Real Estate Holding Company heretofore tendered to the said defendant by these plaintiffs as hereinafter set forth; the said defendant is the duly elected, qualified and acting secretary of state of the state of Washington; these plaintiffs are each of them natives of the Empire of Japan, but after all proceedings required under the naturalization laws of the United States of America had been had each of these plaintiffs have been duly naturalized by a superior court of the State of Washington, and have been duly admitted to citizenship in the United States
4 of America by such superior courts and this affiant is now and for more than ten years last past has been an actual and bona fide resident of the State of Washington. Heretofore these plaintiffs, desiring to form a corporation under and pursuant to the laws of the State of Washington to be known as Japanese Real Estate Holding Company, duly made, executed and acknowledged in triplicate articles of incorporation of said Japanese Real Estate Holding Company, a true and correct copy of which articles is hereto attached and marked "Exhibit A," hereby referred to and by this reference made a part of this affidavit, and upon the 5th day of May, 1921, tendered one original copy of such articles so duly executed and acknowledged together with the necessary filing fee to the said defendant and demanded that he accept and file the same, but the said defendant refused to accept and file the same and still refuses so to do upon the claim that these plaintiffs being of the Japanese race were not at the time of their naturalization and never

at any time have been and are not now entitled under the naturalization laws of the United States of America to be admitted to citizenship in the United States of America and are therefore not entitled under the laws of the State of Washington to form a corporation with sole power of acquiring and holding real estate within the State of Washington, or to file articles of incorporation naming these plaintiffs as sole trustees of the said corporation; thereby the said defendant is depriving these plaintiffs of a right of citizenship duly guaranteed to them by the constitution and the laws of the United States of America and of the State of Washington, and particularly by the fourteenth amendment to the constitution of the United States and the naturalization laws of the United States, and these plaintiffs have no plain, speedy or adequate remedy in the course of law and therefore herewith make application to this court for a writ of mandate directing and commanding the said defendant to accept and file the said articles of incorporation.

(Signed) TAKUJI YAMASHITA.

Subscribed and sworn to before me this 6th day of May, 1921.

(Signed) H. C. BELT,
Notary Public in and for the State of Washington, Residing at Seattle.

EXHIBIT "A."

Articles of Incorporation of Japanese Real Estate Holding Company.

Know all men by these presents, that we, the undersigned, Takuji Yamashita and Chas. Hio Kono, both being natives of Japan, but being duly naturalized citizens of the United States of America, and the said Takuji Yamashita being a resident of the State of Washington, do hereby associate ourselves together for the purpose of forming a corporation under the general incorporation laws of the State of Washington relating to the organization and management of private corporations, and do hereby certify and adopt the following

Articles of Incorporation.

Article I.

The name of this corporation shall be Japanese Real Estate Holding Company.

Article. II.

The objects and purposes for which this corporation is formed are and shall be: To buy and otherwise acquire, own, hold, develop, improve, manage, sell, convey, transfer and lease and dispose of real estate of every nature and description within the State of Washington.

Article III.

The capital stock of this corporation shall be ten thousand dollars, divided into one hundred shares of the par value of one hundred dollars each.

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Article IV.

The time of the existence of this corporation shall be fifty years.

Article V.

The principal place of business of this corporation shall be Seattle, King County, Washington.

Article VI.

The number of trustees of this corporation shall be two, and the names of those of the trustees who shall manage the concerns of the corporation until the 5th day of September, 1921, shall be Takuji Yamashita and Chas. Hio Kono.

In witness whereof, the said Takuji Yamashita and Chas Hio Kono have hereunto set their hands and seals in triplicate this 5th day of April, 1921.

TAKUJI YAMASHITA. [SEAL.]
CHAS HIO KONO. [SEAL.]

STATE OF MONTANA,
County of Chouteau, ss:

This is to certify, that on this 12th day of April, 1921, before me, the undersigned, a notary public in and for said county and state, personally appeared Chas Hio Kono to me personally known to be the individual described in and who executed the foregoing Articles of Incorporation, and duly acknowledged to me that he signed the same as his own free act and deed, for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal this the day and year in this certificate first above written.

[SEAL.] WILL J. BOWMAN,
Notary Public in and for the State of Montana, Residing at Big Sandy.

My commission expires Feb. 28th, 1924.

8 STATE OF WASHINGTON,
County of King, ss:

This is to certify, that on this 4th day of May, 1921, before me, the undersigned, a notary public public in and for said county and

state, personally appeared Takuji Yamashita, to me known to be the individual described in and who executed the foregoing Articles of Incorporation, and duly acknowledged to me that he signed the same as his own free act and deed, for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first above written.

[SEAL.] H. C. BELT,
Notary Public in and for the State of Washington, Residing at Seattle.

9 In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO, Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington, Defendant.

Demurrer.

[Stamp:] Filed in Supreme Court of Washington May 16, 1921. C. S. Reinhart, Clerk. F. S. G.

Comes now the defendant and demurs to the application for writ of mandate, and the affidavit in support of such application, and each of them, in the above entitled case, for the reason that such application and affidavit do not contain facts sufficient to constitute a cause of action.

(Signed) L. L. THOMPSON,
Attorney General;
NAT. U. BROWN,
Attorneys for Defendant.

Office and Post Office Address: Temple of Justice, Olympia, Washington.

(Stamp:) Copy hereof received this May 13, 1921, Shank, Belt & Fairbrook.

10 In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO, Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington, Defendant.

Brief of Plaintiffs.

[Stamp:] Filed in Supreme Court of Washington May 19, 1921. C. S. Reinhart, Clerk. F. S. G.

It is not the desire of the plaintiffs here to enter into any extended arguments on the merits of this case. It is apparent in the case of In re Yamashita, 30 Wash. 234, which so far as we know has never been modified by this court nor overruled by the United States courts, that the view of this court is that Yamashita is not a citizen of the United States. Inasmuch as the same conclusion would undoubtedly have been reached with respect to Kono, it is apparent, unless we could convince the court that in the decision in 30 Washington was erroneous, no good purpose would be subserved by extended argument.

It is the desire, however, of counsel with whom counsel for plaintiffs in this action are associated to present this matter to the Supreme Court of the United States, and inasmuch as we entertain no hope of changing the court's view as to the correctness of the decision in re Yamashita we desire to submit the case on the brief of counsel for applicant in that case, and without citation of further authority.

In support of the petition herein the court is respectfully
11 referred to the case of In re Rodriquez, 81 Fed. 337.

We respectfully wish to request the court, however, that as early a decision be rendered on the petition herein as the business of the court will permit of.

Respectfully,

(Signed) SHANK, BELT & FAIRBROOK,
Attorneys for Plaintiffs.

12 In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO, Plaintiffs,

vs.

J GRANT HINKLE, as Secretary of State of the State of Washington, Defendant.

Defendant's Points and Authorities.

[Stamp:] Filed in Supreme Court of Washington May 19, 1921. C. S. Reinhart, Clerk. F. S. G.

The plaintiffs herein are applying to this court for writ of mandamus directed against J. Grant Hinkle as Secretary of State, requiring him to receive and file articles of incorporation of a certain Japanese real estate holding company of which they are the incorporators. In the affidavit and in the proposed articles of incorporation the plaintiffs recite that they are both natives of Japan and have been duly naturalized citizens of the United States. The defendant has demurred to the application and affidavit and the matter comes on to be heard upon that demurrer.

The sole question involved is whether these plaintiffs are citizens of the United States. It may be conceded by the defendant that these plaintiff- are in possession of citizenship papers issued by the superior court of Pierce county in May 1902. The contention of the defendant is that the order of the superior court admitting these plaintiffs to citizenship was void and of no effect.

The question is not an open one in this state, having been decided adversely to these plaintiffs in re Yamashita, 30 Wash. 234. In that case one of these plaintiffs sought admission to the bar of the state of Washington. This court held that the judgment of the su-

13 perior court admitting him to citizenship shows upon its face that the court was without authority, and such judgment may be attacked at any time and in any proceeding. It further held that the right of naturalization being restricted to free white persons, to aliens of African nativity and to persons of African descent, a native of Japan would not be entitled to citizenship.

The purpose of this action is to obtain a later adjudication of the matter by this court so that the question may be presented to the Supreme court of the United States upon a writ of error. Upon the authority of the Yamashita case the writ should be denied.

Respectfully submitted,

(Signed) L. L. THOMPSON,
Attorney General;
NAT U. BROWN,
Attorneys for Defendant.

Office and Post Office Address: Temple of Justice, Olympia, Washington.

14 In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO, Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington, Defendant.

Order, Friday, May 20, 1921.

[Stamp:] Filed in Supreme Court of Washington. C. S. Reinhart, Clerk, F. S. G.

It is by the court ordered that the petition for mandamus in the above entitled cause be, and the same is hereby denied.

15 In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO, Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington, Defendant.

Petition for Rehearing.

[Stamp:] Filed in Supreme Court of Washington Jun. 9, 1921. C. S. Reinhart, Clerk, F. S. G.

Come now the above mentioned plaintiffs, Takuji Yamashita and Charles Hio Kono, and respectfully petition this court for a rehearing either before the department that heard the said application, or before the entire court en banc, as to the court shall seem proper. The petition is made upon the following grounds, to-wit:

The decision of the department herein denying the writ of mandamus asked for herein deprives these plaintiffs of a right of citizenship guaranteed to them by the Constitution and the Laws of the United States of America, and the State of Washington, and particularly by the 14th Amendment to the Constitution of the United States, and the Naturalization Laws of the United States.

Respectfully submitted,

(Signed) SHANK, BELT & FAIRBROOK,
Attorneys for Plaintiff.

16 In the Supreme Court of the State of Washington. En Banc.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO, Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington, Defendant.

Order, Tuesday, June 28, 1921.

[Stamp:] Filed in Supreme Court of Washington. C. S. Reinhart, Clerk, F. S. G.

The petition for rehearing in the above entitled cause having been heretofore submitted to the court, and the court having fully considered the same, and being fully advised in the premises, it is now by the court ordered that the said petition be, and the same is, hereby denied.

17 In the Supreme Court of the State of Washington

No. 16567.

TAKUJI YAMASHITA et al., Plaintiffs,

vs.

J GRANT HINKLE, as Secretary of State of Washington, Respondent.

Judgment.

This cause having been heretofore submitted to the court upon the petition of the plaintiffs for a writ of mandamus to compel the respondent to receive and file the articles of incorporation of the Japanese Real Estate Holding Co., and upon the argument of counsel, and the court having fully considered the same, it is now here ordered and adjudged that the petition be, and the same is, hereby denied and that the said J. Grant Hinkle, as Secretary of State have and recover of and from the said Takuji Yamashita and Charles Hio Kono the costs of this action taxed and allowed at Fifteen Dollars, and that execution issue therefor.

18 In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO, Plaintiffs,

v.

J. GRANT HINKLE, as Secretary of State of the State of Washington, Defendant.

Præcipe.

Filed in Supreme Court of Washington Jul. 11, 1921. C. S. Reinhart, Clerk. F. S. G.

To the Clerk of said Court:

Please prepare transcript of the entire record in the above entitled case.

(Signed) SHANK, BELT & FAIRBROOK,
Attorneys for Plaintiffs.

19 STATE OF WASHINGTON,
County of Thurston, ss:

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct transcript of the record in the above entitled cause as the same now remains of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court, this 8th day of August, 1921.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk.

20 In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO, Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington, Defendant.

Stipulation Regarding Record.

It is hereby stipulated that the certified copy of the transcript of record in the above entitled cause now on file with the clerk of the Supreme Court of the United States in the case of Takuji Yamashita

and Charles Hio Kono, petitioners vs. J. Grant Hinkle, as Secretary of State of the State of Washington, defendant, being cause No. 545 of the October term 1921, may be taken as a return to the writ of certiorari granted out of the said court and cause on the 24th day of October, 1921, said writ being dated the 1st day of November, 1921.

Dated this 15th day of November, 1921.

SHANK, BELL & FAIRBROOK,
Attorney for Plaintiffs.

L. L. THOMPSON,
Attorney General,
Attorneys for Defendant.

21 STATE OF WASHINGTON,
County of Thurston, ss:

I, C. S. Reinhart, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct copy of *the* a stipulation of counsel as the same was filed on the 15th day of November, 1921 and now remains of record in my office, which is forwarded as a return to the writ of Certiorari just filed.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court, this 15th day of November, 1921.

[Seal of the Supreme Court, State of Washington.]

C. S. REINHART,
Clerk.

22 Filed in Supreme Court of Washington Nov. 15, 1921. C. S. Reinhart, Clerk. F. S. G.

22 16567.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Washington, Greeting:

Being informed that there is now pending before you a suit in which Takuji Yamashita and Charles Hio Kono are plaintiffs, and J. Grant Hinkle, as Secretary of State of the State of Washington, is defendant, No. 16567, which suit was removed into the said Supreme Court by virtue of an application for a writ of mandate, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United
23 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and

proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the first day of November, in the year of our Lord one thousand nine hundred and twenty-one.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 28,500. Supreme Court of the United States, No. 545, October Term, 1921. Takuji Yamashita et al. vs. J. Grant Hinkle, as Secretary of State of the State of Washington. Writ of Certiorari.

24 [Endorsed:] File No. 28,500. Supreme Court U. S. October Term, 1921. Term No. 545. Takuji Yamashita, et al., Petitioners, vs. J. Grant Hinkle, as Sec'y of State, &c. Writ of Certoirari and Return. Filed Dec. 5, 1921.

25 [Endorsed:] Supreme Court of the United States. October Term, 1921. Takuji Yamashita and Charles Hio Kono, Petitioners, vs. J. Grant Hinkle as Secretary of State of the State of Washington, Respondent. Petition and Certiorari. Transcript of Record. Corwin S. Shank, Attorney for Petitioners, 1002 Alaska Building, Seattle, Washington.

Endorsed on cover: File No. 28,500. Washington Supreme Court. Term No. 545. Takuji Yamashita and Charles Hio Kono, petitioners, vs. J. Grant Hinkle, as Secretary of State of the State of Washington. Petition for writ of certiorari and Exhibit thereto. Filed September 22, 1921. File No. 28,500.

No. 16567

In the Supreme Court of the United States

OCTOBER TERM, 1921.

TAKUJI YAMASHITA and
CHARLES HIO KONO,

Petitioners,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,

Respondent.

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Petition for Writ

CORWIN S. SHANK,
Attorney for Petitioners.

1002 Alaska Building
SEATTLE

PRESS OF PLINY L. ALLEN CO., SEATTLE

In the Supreme Court of the United States

OCTOBER TERM, 1921.

TAKUJI YAMASHITA and
CHARLES HIO KONO,

Petitioners,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,

Respondent.

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Petition for Writ

To the Honorable the Supreme Court of the United States:

The petition of Takuji Yamashita and Charles Hio Kono respectfully shows to this honorable court as follows:

On the 14th day of May, 1921, these petitioners

filed in the Supreme Court of the State of Washington (being the court having jurisdiction of the person of the defendant and the subject matter of the cause of action hereinafter set forth) their application for a writ of mandate requiring the respondent to accept and file certain articles of incorporation theretofore tendered to the respondent and described in the said application. This application was supported by the affidavit of the petitioners wherein they stated that they were of the Japanese race, but had been duly admitted to citizenship in the United States by a Superior Court of the State of Washington after all proceedings required in such cases under the naturalization laws of the United States of America had been duly had. Said affidavit further showed that desiring to form a corporation under the laws of the State of Washington, these petitioners had duly executed and tendered to the respondent articles of incorporation of such corporation, but that the respondent had refused to accept and file such articles of incorporation and still refuses so to do upon the claim that these petitioners being of the Japanese race were not at the time of their naturalization, and never at any time had been, entitled under the naturalization laws of the United States of America, to be admitted to citizenship in the United States of America, and were therefore not entitled under the laws of the

State of Washington to form such a corporation as these petitioners were attempting to form. The said affidavit further showed that the said respondent was thereby depriving these petitioners of a right of citizenship duly guaranteed to them by the constitution and laws of the United States of America, and particularly by the Fourteenth Amendment to the constitution of the United States and the naturalization laws of the United States.

The said respondent thereafter duly appeared in said cause and demurred to the said application and affidavit in support thereof upon the sole and only ground that the said application and affidavit did not contain facts sufficient to constitute a cause of action.

The said cause came duly on for hearing before department two of the Supreme Court of the State of Washington upon the 20th day of May, 1921, upon the said application and affidavit of these petitioners and the said demurrer of the respondent and the respective briefs of both parties, and thereupon the said application of these petitioners was denied by the said department of said court.

Thereafter and within the time required by the statute of the State of Washington and the rules and practice of the said Supreme Court of the State of Washington, these petitioners filed their petition for rehearing both before the said

department and before the entire court *en banc,* and in the said petition for rehearing these petitioners again raised the claim that by the action of the respondent and of the said court they were being deprived of their right of citizenship guaranteed to them by the constitution and laws of the United States of America, but the said petition having been duly considered by the said Supreme Court of the State of Washington *en banc,* was, by the court on the 28th day of June, 1921, denied, and the said order was a final judgment in the highest court of the State of Washington in which a decision in said matter could or can be had and these petitioners are without remedy unless this Honorable Court grants this petition for a writ of certiorari.

These petitioners further show that the reasons relied upon by them for the allowance of the said writ are that the judgments and orders of the Supreme Court of the State of Washington, as hereinbefore set forth, deprive these petitioners of a right of citizenship in the United States of America guaranteed to them by the constitution and naturalization laws of the United States of America and theretofore duly bestowed upon them after due and proper proceedings had in a court having jurisdiction of the subject of naturalization, all of the said proceedings having been had in accordance

with the naturalization laws of the United States of America, and further that the said judgments and orders of the Supreme Court of the State of Washington constitute an adjudication that these petitioners are not citizens of the United States of America in spite of the adjudications theretofore had in the Superior Courts of the State of Washington as hereinbefore set forth.

These petitioners present herewith as a part of this petition a brief showing more fully their views upon the questions involved, and furnish as an exhibit hereto a certified copy of the entire transcript of record of the case showing all the proceedings of the said Supreme Court of the State of Washington.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this court, directed to the Supreme Court of the State of Washington, commanding said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Supreme Court of the State of Washington in this case, which was entitled in that court "Takuji Yamashita and Charles Hio Kono, Plaintiffs, vs. J. Grant Hinkle, as Secretary of State of the State of Washington, Defendant," to the

end that said cause may be reviewed and determined by this court as provided by law, and that your petitioners may have such other and further relief or remedy in the premises as to this court may seem appropriate; and that the said judgment of the Supreme Court of the State of Washington may be reversed by this Honorable Court.

TAKUJI YAMASHITA
CHARLES HIO KONO
By CORWIN S. SHANK,
Attorney for said Petitioners.

CORWIN S. SHANK,
Attorney for said Petitioners.

No. 16567

In the Supreme Court of the United States

OCTOBER TERM, 1921.

TAKUJI YAMASHITA and
CHARLES HIO KONO,

Petitioners,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,

Respondent.

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Transcript of Record

CORWIN S. SHANK,
Attorney for Petitioners.

1002 Alaska Building
SEATTLE

In the Supreme Court of the State of Washington.

No. 16567

TAKUJI YAMASHITA and
CHARLES HIO KONO,

Petitioners,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,

Respondent.

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In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO,

Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,

Defendant.

NOTICE OF HEARING OF APPLICATION.

(Stamp.) Filed in Supreme Court of Washington May 16, 1921. C. S. Reinhart, Clerk. F. S. G.

To the above named defendant, J. Grant Hinkle, as secretary of state of the State of Washington:

You are hereby notified that the plaintiffs will call the attached application for writ of mandate up for hearing before the Supreme Court of the State of Washington at its court room in the temple of justice in the City of Olympia, Washington, upon the sitting of the said court in its morning session on the 20th day of May, 1921, or as soon thereafter as the said matter can be heard.

(Signed) SHANK, BELT & FAIRBROOK,

Attorneys for said Plaintiffs.

In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO,

Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,

Defendant.

APPLICATION FOR WRIT OF MANDATE.

(Stamp.) Filed in Supreme Court of Washington May 14, 1921. C. S. Reinhart, Clerk. F. S. G.

Comes now Takuji Yamashita and Charles Hio Kono and make application herein for a writ of mandate directed to the above named defendant J. Grant Hinkle, as secretary of state of the State of Washington, requiring the said J. Grant Hinkle to receive and file the articles of incorporation of Japanese Real Estate Holding Company, heretofore tendered to the said defendant by the said plaintiffs as set forth in the accompanying affidavit. This application is based upon the affidavit hereto attached, which is hereby referred to and made a part of this application.

(Signed) SHANK, BELT & FAIRBROOK,

Attorneys for said Plaintiffs.

In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA et al.,

Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,

Defendant.

AFFIDAVIT IN SUPPORT OF APPLICATION FOR WRIT OF MANDATE.

State of Washington, County of King. ss.

TAKUJI YAMASHITA, being first duly sworn, on oath deposes and says:

I am one of the above named plaintiffs and make this affidavit on behalf of myself and my above named co-plaintiff for the purpose of obtaining a writ of mandate out of this court directed to the above named defendant J. Grant Hinkle, as secretary of state of the State of Washington, requiring the said defendant to receive and file articles of incorporation of Japanese Real Estate Holding Company heretofore tendered to the said defendant by these plaintiffs as hereinafter set forth; the said defendant is the duly elected, qualified and acting secretary of state of the State of Washington; these plaintiffs are each of them natives of the Empire of Japan, but after all proceedings required under the

naturalization laws of the United States of America had been had each of these plaintiffs have been duly naturalized by a superior court of the State of Washington, and have been duly admitted to citizenship in the United States of America by such superior courts, and this affiant is now and for more than ten years last past has been an actual and bona fide resident of the State of Washington. Heretofore these plaintiffs, desiring to form a corporation under and pursuant to the laws of the State of Washington to be known as Japanese Real Estate Holding Company, duly made, executed and acknowledged in triplicate articles of incorporation of said Japanese Real Estate Holding Company, a true and correct copy of which articles is hereto attached and marked "Exhibit A," hereby referred to and by this reference made a part of this affidavit, and upon the 5th day of May, 1921, tendered one original copy of such articles so duly executed and acknowledged together with the necessary filing fee to the said defendant and demanded that he accept and file the same, but the said defendant refused to accept and file the same and still refuses so to do upon the claim that these plaintiffs being of the Japanese race were not at the time of their naturalization and never at any time have been and are not now entitled under the naturalization laws of the United States

of America to be admitted to citizenship in the United States of America and are therefore not entitled under the laws of the State of Washington to form a corporation with sole power of acquiring and holding real estate within the State of Washington, or to file articles of incorporation naming these plaintiffs as sole trustees of the said corporation; thereby the said defendant is depriving these plaintiffs of a right of citizenship duly guaranteed to them by the constitution and the laws of the United States of America and of the State of Washington, and particularly by the fourteenth amendment to the constitution of the United States and the naturalization laws of the United States, and these plaintiffs have no plain, speedy or adequate remedy in the course of law and therefore herewith make application to this court for a writ of mandate directing and commanding the said defendant to accept and file the said articles of incorporation.

(Signed) TAKUJI YAMASHITA.

Subscribed and sworn to before me this 6th day of May, 1921.

(Signed) H. C. BELT.

Notary Public in and for the State of Washington, residing at Seattle.

EXHIBIT "A."

ARTICLES OF INCORPORATION of JAPANESE REAL ESTATE HOLDING COMPANY.

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned, TAKUJI YAMASHITA and CHAS. HIO KONO, both being natives of Japan, but being duly naturalized citizens of the United States of America, and the said Takuji Yamashita being a resident of the State of Washington, do hereby associate ourselves together for the purpose of forming a corporation under the general incorporation laws of the State of Washington relating to the organization and management of private corporations, and do hereby certify and adopt the following

ARTICLES OF INCORPORATION.

Article I.

The name of this corporation shall be JAPANESE REAL ESTATE HOLDING COMPANY.

Article II.

The objects and purposes for which this corporation is formed are and shall be: To buy and otherwise acquire, own, hold, develop, improve, manage,

sell, convey, transfer and lease and dispose of real estate of every nature and description within the State of Washington.

ARTICLE III.

The capital stock of this corporation shall be ten thousand dollars, divided into one hundred shares of the par value of one hundred dollars each.

ARTICLE IV.

The time of the existence of this corporation shall be fifty years.

ARTICLE V.

The principal place of business of this corporation shall be Seattle, King County, Washington.

ARTICLE VI.

The number of trustees of this corporation shall be two, and the names of those of the trustees who shall manage the concerns of the corporation until the 5th day of September, 1921, shall be TAKUJI YAMASHITA and CHAS. HIO KONO.

IN WITNESS WHEREOF, the said TAKUJI YAMASHITA and CHAS. HIO KONO have hereunto set their hands and seals in triplicate this 5th day of April, 1921.

TAKUJI YAMASHITA, (Seal.)
CHAS. HIO KONO. (Seal.)

State of Montana, County of Chouteau, *ss.*

THIS IS TO CERTIFY, that on this 12th day of April, 1921, before me, the undersigned, a notary public in and for said county and state, personally appeared Chas. Hio Kono to me personally known to be the individual described in and who executed the foregoing Articles of Incorporation, and duly acknowledged to me that he signed the same as his own free act and deed, for the uses and purposes therein mentioned.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my notarial seal this the day and year in this certificate first above written.

WILL J. BOWMAN,

(Seal.) Notary Public in and for the State of Montana, residing at Big Sandy. My commission expires Feb. 28th, 1924.

State of Washington, County of King. *ss.*

THIS IS TO CERTIFY, that on this 4th day of May, 1921, before me, the undersigned, a notary public in and for said county and state, personally appeared TAKUJI YAMASHITA, to me known to be the individual described in and who executed the foregoing Articles of Incorporation, and duly acknowledged to me that he signed the same as his own

free act and deed, for the uses and purposes therein mentioned.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first above written.

H. C. BELT,
Notary Public in and for the State of Washington, residing at Seattle.

In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO,

Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,

Defendant.

DEMURRER.

(Stamp.) Filed in Supreme Court of Washington May 16, 1921. C. S. Reinhart, Clerk. F. S. G.

Comes now the defendant and demurs to the application for writ of mandate, and the affidavit in

support of such application, and each of them, in the above entitled case, for the reason that such application and affidavit do not contain facts sufficient to constitute a cause of action.

(Signed) L. L. THOMPSON,
Attorney General.
NAT U. BROWN,
Attorneys for Defendant.

Office and Post Office Address:
Temple of Justice, Olympia, Washington.

(Stamp.) Copy hereof received this May 13, 1921.
Shank, Belt & Fairbrook.

In the Supreme Court of the State of Washington.
No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO,
Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,
Defendant.

BRIEF OF PLAINTIFFS.

(Stamp.) Filed in Supreme Court of Washington May 19, 1921. C. S. Reinhart, Clerk. F. S. G.

It is not the desire of the plaintiffs here to enter

into any extended arguments on the merits of this case. It is apparent in the case of In re Yamashita, 30 Wash. 234, which so far as we know has never been modified by this court nor overruled by the United States courts, that the view of this court is that Yamashita is not a citizen of the United States. Inasmuch as the same conclusion would undoubtedly have been reached with respect to Kono, it is apparent, unless we could convince the court that in the decision in 30 Washington was erroneous, no good purpose would be subserved by extended argument.

It is the desire, however, of counsel with whom counsel for plaintiffs in this action are associated to present this matter to the Supreme Court of the United States, and inasmuch as we entertain no hope of changing the court's view as to the correctness of the decision in re Yamashita we desire to submit the case on the brief of counsel for applicant in that case, and without citation of further authority.

In support of the petition herein the court is respectfully referred to the case of *In re Rodriquez,* 81 Fed. 337.

We respectfully wish to request the court, however, that as early a decision be rendered on the peti-

tion herein as the business of the court will permit of.

Respectfully,

(Signed) SHANK, BELT & FAIRBROOK,
Attorneys for Plaintiffs.

In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO,

Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,

Defendant.

DEFENDANT'S POINTS AND AUTHORITIES.

(Stamp.) Filed in Supreme Court of Washington May 19, 1921. C. S. Rinehart, Clerk. F. S. G.

The plaintiffs herein are applying to this court for writ of mandamus directed against J. Grant Hinkle as Secretary of State, requiring him to receive and file articles of incorporation of a certain Japanese real estate holding company of which they are the incorporators. In the affidavit and in the proposed articles of incorporation the plaintiffs recite that they are both natives of Japan and have

been duly naturalized citizens of the United States. The defendant has demurred to the application and affidavit and the matter comes on to be heard upon that demurrer.

The sole question involved is whether these plaintiffs are citizens of the United States. It may be conceded by the defendant that these plaintiffs are in possession of citizenship papers issued by the superior court of Pierce County in May, 1902. The contention of the defendant is that the order of the superior court admitting these plaintiffs to citizenship was void and of no effect.

The question is not an open one in this state, having been decided adversely to these plaintiffs in *re Yamashita,* 30 Wash. 234. In that case one of these plaintiffs sought admission to the bar of the state of Washington. This court held that the judgment of the superior court admitting him to citizenship shows upon its face that the court was without authority and such judgment may be attacked at any time and in any proceeding. It further held that the right of naturalization being restricted to free white persons, to aliens of African nativity and to persons of African descent, a native of Japan would not be entitled to citizenship.

The purpose of this action is to obtain a later adjudication of the matter by this court so that the

question may be presented to the Supreme Court of the United States upon a writ of error. Upon the authority of the Yamashita case the writ should be denied.

Respectfully submitted,
(Signed) L. L. THOMPSON,
Attorney General.
NAT U. BROWN,
Attorneys for Defendant.

Office and Post Office Oddress:
Temple of Justice, Olympia, Washington.

In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO,

Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,

Defendant.

ORDER.

Friday, May 20, 1921. (Stamped.) Filed in Supreme Court of Washington. C. S. Reinhart, Clerk.

F. S. G.

It is by the court ordered that the petition for mandamus in the above entitled cause be, and the same is hereby denied.

In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO,

Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,

Defendant.

PETITION FOR RE-HEARING.

(Stamp.) Filed in Supreme Court of Washington June 9, 1921. C. S. Reinhart, Clerk. F. S. G.

Come now the above mentioned plaintiffs, Takuji Yamashita and Charles Hio Kono, and respectfully petition this court for a re-hearing either before the department that heard the said application, or before the entire court en banc, as to the court shall seem proper. The petition is made upon the following grounds, to-wit:

The decision of the department herein denying the writ of mandamus asked for herein deprives these plaintiffs of a right of citizenship guaranteed to them by the Constitution and Laws of the United States of America, and the State of Washington, and particularly by the 14th Amendment to the Con-

stitution of the United States, and the Naturalization Laws of the United States.

Respectfully submitted,

(Signed) SHANK, BELT & FAIRBROOK,

Attorneys for Plaintiff.

In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO,

Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,

Defendant.

EN BANC.

Order: Tuesday, June 28, 1921.

(Stamp.) Filed in Supreme Court of Washington. C. S. Reinhart, Clerk. F. S. G.

The petition for rehearing in the above entitled cause having been heretofore submitted to the court, and the court having fully considered the same, and being fully advised in the premises, it is now by the court ordered that the said petition be, and the same is, hereby denied.

In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO,

Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,

Respondent.

JUDGMENT.

This cause having been heretofore submitted to the court upon the petition of the plaintiffs for a writ of mandamus to compel the respondent to receive and file the articles of incorporation of the Japanese Real Estate Holding Co., and upon the argument of counsel, and the court having fully considered the same, it is now here ordered and adjudged that the petition be, and the same is, hereby denied and that the said J. Grant Hinkle, as Secretary of State, have and recover of and from the said Takuji Yamashita and Charles Hio Kono the costs of this action taxed and allowed at Fifteen Dollars, and that execution issue therefor.

In the Supreme Court of the State of Washington.

No. 16567.

TAKUJI YAMASHITA and CHARLES HIO KONO,

Plaintiffs,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,

Defendant.

PRAECIPE.

Filed in Supreme Court of Washington, Jul. 11, 1921. C. S. Reinhart, Clerk. F. S. G.

To the Clerk of said Court:

Please prepare transcript of the entire record in the above entitled case.

(Signed) SHANK, BELT & FAIRBROOK,
Attorneys for Plaintiffs.

State of Washington, County of Thurston. *ss.*

I, C. S. REINHART, Clerk of the Supreme Court of the State of Washington, hereby certify that the above and foregoing is a full, true and correct transcript of the record in the above entitled cause as the same now remains of record in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of said Court this 8th day of August, 1921.

C. S. REINHART,

(Seal.) *Clerk.*

No. 16567

In the Supreme Court of the United States

OCTOBER TERM, 1921.

TAKUJI YAMASHITA and
CHARLES HIO KONO,

Petitioners,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,

Respondent.

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Brief of Petitioners

CORWIN S. SHANK,
Attorney for Petitioners.

1002 Alaska Building
SEATTLE

PRESS OF PLINY L. ALLEN CO., SEATTLE

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CASES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1921.

TAKUJI YAMASHITA and
CHARLES HIO KONO,
Petitioners,

vs.

J. GRANT HINKLE, as Secretary of State of the State of Washington,
Respondent.

ON PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Brief of Petitioners

Statement of the Case.

The petitioners in this case are of the Japanese race but were duly naturalized in superior courts of the State of Washington. Desiring to exercise

a right of citizenship they sought to form a corporation but the respondent refused to accept the tendered articles of incorporation upon the sole ground that in spite of their certificates of naturalization he did not consider them citizens of the United States and concluded that they were therefore not eligible to form the corporation which they were endeavoring to form. Thereupon the petitioners made application to the supreme court of the State of Washington for a writ of mandate directed to the respondent to compel him to accept and file such articles of incorporation. The respondent demurred to the application and supporting affidavit of these petitioners, thereby admitting the facts as hereinabove set forth. Upon the hearing the only question advanced by both parties was the question of whether the petitioners were citizens of the United States and the supreme court of the State of Washington refused the application, and to review the final order refusing this application these petitioners now petition this Honorable Court for a writ of certiorari.

Assignment of Error.

These petitioners respectively submit that under the facts stated they are citizens of the United States of America and are entitled to all the rights

and privileges of such citizens and that the judgments and orders of the supreme court of the state of Washington deprive them of such rights.

ARGUMENT.

The Statutes of the Case.

The decision of this case depends upon the interpretation of three paragraphs of the federal statutes as follows: "Sec. 2165. An alien may be admitted to become a citizen of the United States in the following manner * * * ."

Revised Statutes, §2165.

"Sec. 2169. The provisions of this title shall apply to aliens being free white persons and to aliens of African nativity and to persons of African descent."

Revised Statutes, §2169.

"Sec. 14. That hereafter no state court, or court of the United States, shall admit Chinese to citizenship, and all laws in conflict with this act are hereby repealed."

22 *Stat. L.* 58, Chap. 126, §14.

These three provisions have resulted in one of the most curious mazes of legal interpretation of any statutes ever passed. The first quoted section is expressly inclusive of all aliens. The second quoted section extends naturalization to "free white per-

sons" and persons of African nativity or descent. The third statute denies citizenship to Chinese and expressly repeals "all laws in conflict with this act." The second section 2169 includes classes of persons that were already included in section 2165 and section 14 excludes a class of persons that were included in section 2165 but were not included in section 2169. Such a conflict of provisions cannot help but result in the hopeless maze of decisions that have resulted and must continue a puzzle to the naturalization courts of this country until this court renders its authoritative decision thereon.

THE CONFLICT IN THE DECISIONS ON THIS QUESTION.

Before the decision *In re Yamashita,* 30 Wash. 234, Japanese were frequently admitted without question in many of the western courts, and among the Japanese so admitted were these two petitioners. Whether they were admitted upon the court's interpretation of the statute to mean that persons of all races except Chinese were admissible or whether the court took judicial notice of the fact that the Japanese race was predominantly Caucasian, or whether the court found that these particular Japanese were as a matter of fact free white persons, does not appear, but it does appear that the court admitted these petitioners to citizenship.

In 1894 Circuit Judge Colt in the Circuit Court

of the District of Massachusetts in the case of *In re Saito,* 62 Fed. 126, decided that a Japanese was not admissible to citizenship, founding his opinion chiefly upon various statements found in the debates of Congress at the time of the passage of the act, and ethnological classifications by various text book writers who may never have seen a member of the Japanese race and whose writings may never have been read by a single member of Congress who passed the act. This decision in so far as the Japanese are concerned has been blindly followed by the only subsequent decisions which appear in the reports, apparently without any independent investigation as to the proper ethnological classification of the Japanese race.

In re Kumagai, 163 Fed. 922 (D. C. W. D. Wn. N. D.)

In re Yamashita, 30 Wash. 234.

In re Narasaki, 269 Fed. 643. (D. C. S. D. N. Y.)

All of these decisions assume as a matter of judicial notice that a Japanese is a Mongol and follow the interpretation of the statute laid down in *In re Saito* that Sec. 2169, under the theory of *expressio unius est exclusio alterius,* excludes all but white and black and entirely ignore the same theory when it comes to interpreting the clause of the statute excluding Chinese and repealing all laws in conflict therewith.

The next time these provisions came up for interpretation in relation to an Asiatic was in the case of *In re Knight,* 171 Fed. 299, wherein the District Court of the Eastern District of New York decided that an applicant whose father was an Englishman and whose mother was one-half Chinese and one-half Japanese was not white enough to be admitted, but immediately thereafter a Syrian making application for admission in the case of *In re Najour,* 174 Fed. 735 (C. C. N. D. Ga.), the Circuit Court for the Northern District of Georgia ignored the aforesaid debates in Congress to the effect that all Asiatics must be excluded and, following a more modern authority on ethnology, took judicial notice of a work by A. H. Keane to the effect that a Syrian was a white man, and also, finding from inspection, that the applicant "was not particularly dark," concluded that he was therefore entitled to admission.

Almost simultaneously therewith, in *In re Halladjian,* 174 Fed. 834 (C. C. D. Mass.), Judge Lowell decided that four Armenians were white enough to be admitted by reason of the fact that both historical and modern ethnological authorities agree that Armenians had a considerable proportion of white blood in them and that the applicants were no darker than many other applicants that had been

admitted in the same court. This decision was followed in the case of Syrians in *In re Mudarri,* 176 Fed. 465 (C. C. D. Mass.), and in the District Court for the District of Oregon in *In re Ellis,* 179 Fed. 1002.

Next comes the case of a Parsee from Bombay in *In re Balsara,* 171 Fed. 294 (C. C. S. D. N. Y.), and *U. S. vs. Balsara,* 180 Fed. 694 (C. C. A. 2nd Cir.). This applicant was admitted by the Circuit Court of the Southern District of New York upon the express grounds that a satisfactory interpretation of the statute was impossible and as the government was prepared to appeal from an order admitting the applicant to citizenship such an order should be entered in order to obtain a ruling by the Circuit Court of Appeals. The Circuit Court of Appeals for the Second Circuit held that the term "free white person" meant Caucasian regardless of the shade of white, and further took judicial notice of an immigration of Parsees from Persia into India supposed to have happened some 1200 years ago, and accordingly concluded that a Parsee was entitled to naturalization.

A Philippino was decided not to be a white person in *In re Alverto,* 198 Fed. 688 (D. C. E. D. Pa.), *In re Lampitoe,* 232 Fed. 382 (D. C. S. D. N. Y.), *In re Mallari,* 239 Fed. 416 (D. C. D. Mass.), and

In re Rallos, 241 Fed. 686 (D. C. E. D. N. Y.); but was declared worthy of citizenship in *In re Bautista,* 245 Fed. 765 (D. C. N. D. Cali.).

In *In re Akhay Kumar Mozumbdar,* 207 Fed. 115 (D. C. E. D. Wn.), Judge Rudkin accepted the testimony of a Hindu to the effect that he was a white man and accordingly ordered him admitted to citizenship.

The opposite conclusion regarding a Hindu was reached by Judge Dickerson in the District Court for the Eastern District of Pennsylvania in *In re Sadar Bhagwab Singh,* 246 Fed. 496, who disregarded ethnological classifications and drew the color line closely, and concluded that inasmuch as the Hindu before him was not white he was not admissible.

In the cases, however, of *In re Mohan Singh,* 257 Fed. 209 (D. C. S. D. Cal.), and of *In re Bhagat Singh Thind,* 268 Fed. 683 (D. C. Ore.), the courts concluded that the Hindu was eligible to citizenship, the decision in the latter case being based upon what the judge considered the weight of authority.

Koreans were refused admission in the *Petition of Easurk Emsen Charr,* 273 Fed. 207 (D. C. W. D. Mo.), and in *In re En Sk Song,* 271 Fed. 23 (D. C. S. D. Cal.).

This, we believe, is the complete list of the reported cases on the question of the admissibility of

Asiatics to citizenship in the United States. Only two of these cases came to a Circuit Court of Appeals, the state courts in the meantime having been busy admitting and refusing applicants without their opinions being reported, each judge following his own ideas as to whether the applicant was admissible or not. It will be seen that some judges follow classifications laid down by authors who were dead before Japan was open to foreigners and who perhaps never saw a member of the Japanese race or even talked with anyone who had seen a member of the Japanese race. Some judges passed upon whether the applicant was white by personal inspection; some by listening to the applicant's statement as to his ancestors; some by searching through ancient history and weighing the probabilities of whether the Mongol or the Caucasian was predominant in the race. Every conceivable method of deciding this matter has been adopted by various courts and will continue to be adopted until this court furnishes some definite rule to be followed. In the meantime, either many applicants are admitted to citizenship who are not entitled under the statute to be admitted, or many persons who are lawfully resident in this country, whose children are citizens, who are themselves anxious to become citizens and would make good citizens, are unwillingly deprived

of their right by reason of the fact that back in 1781 an individual named Blumenbach compiled a classification of mankind in which he declared a Japanese to be a Mongol and this classification has since been followed by various trial courts.

THE TRUE INTERPRETATION OF THESE STATUTES.

As we have said before, a consistent application of the maxim *expressio unius est exclusio alterius* would if applied consistently bring us to the conclusion that the Japanese are admissible. Sec. 2169 as originally passed applied the title to Africans. An interpretation that only Africans were admissible to citizenship would be ridiculous, but nevertheless, to save the question, this was corrected so as to make the section read as hereinbefore set forth. But if only whites and blacks are admissible to citizenship what was the reason for the act of 1882 forbidding the admission of Chinese? It can only be explained upon the theory that Congress concluded the Chinese admissible and intended to forbid the admission of Chinese and Chinese only. Therefore the application of this maxim *expressio unius est exclusio alterius* to the statutes would render Japanese admissible. Reference to the debates in Congress bring us nowhere because at that time there was no idea of an influx of Japanese, or Syrians, or Hindus, or any Asiatics excepting the Chinese, and the Chinese are effectually barred by

the act of 1882. Debates in Congress were considered when it was a question of admitting Japanese, but were ignored when it came to admitting other Asiatics.

What, then, did Congress mean by Sec. 2169? The answer is contained in an historical fact which is well illustrated in the next title of the Revised Statutes relating to the census. Congress had in mind a classification of but three classes—white, black and Indians. Indians were disregarded in the naturalization act because they were in the peculiar situation of being neither citizens nor aliens, but "wards of the government." Blacks were cared for by extending the privilege of naturalization to them. Sec. 2165 extended the right of naturalization to any alien, and the correction of Sec. 2169 made it certain that no white person would be excluded. What reason is there to believe that Congress thereby intended to exclude Japanese any more than there is to believe that Congress intended to exclude whites when the original Revised Statutes were enacted?

In the succeeding title of the Revised Statutes, being Title XXXI., relating to the census, Sec. 2176, provides for the enumeration of all inhabitants, omitting from the enumeration of inhabitants "Indians not taxed," while Sec. 2206 described the schedules of this enumeration, and one of the classifications in the schedules is "Color: White, black or

mulatto." This is the classification made by Congress of inhabitants of this country. No one can claim that it is scientific or that it is accurate, but it is the one distinction of color and the only distinction in which Congress was interested at that time. Their classification was white and black. That embraced all mankind and their extension of the privilege of naturalization to whites and Africans was intended to cover the world.

The decisions which we have cited assume that a member of the Japanese race was a Mongolian. This assumption in the earlier decisions was expressly based upon the classifications of theorists of the eighteenth century and the early part of the nineteenth century. These theories were promulgated when Japan was a closed country. Later authorities have thrown a doubt upon this classification and have rendered it not impossible that a member of the Japanese race could be considered at least a member of the Aryan or Caucasian race. We will not burden this court with lengthy extracts from these authorities, but ask this court's indulgence for the privilege of showing this fact hereafter.

We submit that we have shown that the decisions upon the admission of Asiatics to citizenship are, owing to the obscurity of the statute law and the general difficulty of the matter, hopelessly at vari-

ance with each other, and that each judge holding a naturalization court at present follows the dictates of his own judicial discretion in a matter that should follow an absolutely certain rule. We would therefore respectfully ask that the petitioners' petition for a writ of certiorari be granted to the end that this matter, which is of great importance to the country, should be finally and authoritatively settled.

Respectfully,

CORWIN S. SHANK,

Attorney for Petitioners.

IN THE

Supreme Court of the United States

October Term, 1922

[No. 177.]

TAKUJI YAMASHITA and CHARLES HIO KONO,
Petitioners,

against

J. GRANT HINKLE, as Secretary of State of the State of Washington,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Washington.

BRIEF FOR PETITIONERS

COBWIN S. SHANK,
Attorney for Petitioners.

GEO. W. WICKERSHAM,
of Counsel.

INGLE, INC., 165 William Street, New York City.

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SCIENTIFIC AUTHORITIES CITED.

IN THE

Supreme Court of the United States

October Term, 1922

TAKUJI YAMASHITA and CHARLES HIO KONO, *Petitioners,* *against* J. GRANT HINKLE, as Secretary of State of the State of Washington, *Respondent.*	No. 177

On Writ of Certiorari to the Supreme Court of the State of Washington.

BRIEF FOR PETITIONERS.

Statement.

This petition was granted to review a judgment rendered by the Supreme Court of Washington refusing a writ of mandamus to compel the respondent, the Secretary of State of the State of Washington, to receive and file articles of incorporation of the Japanese Real Estate Holding Company, prepared and executed in conformity with the General Corporation Laws of that State, relating to the organization and the management of private corporations, for the sole reason that the petitioners, the incorporators named in said articles of incorporation, are both natives of Japan, although duly naturalized citizens of the United States.

A stipulation filed by counsel sets forth:

> "The sole question involved is whether these plaintiffs are citizens of the United States. It

> may be conceded by the defendant that these plaintiffs are in possession of citizenship papers issued by the Superior Court of Pierce County in May, 1902. The contention of the defendant is that the order of the Superior Court admitting these plaintiffs to citizenship was void and of no effect" (Rec., p. 7).

The action of the defendant was based upon a decision of the Supreme Court of the State of Washington in the case of *In re Yamashita,* 30 Wash., 234. In that case, one of these plaintiffs sought admission to the bar of the State of Washington. The Supreme Court held that the judgment of the Superior Court admitting him to citizenship showed upon its face that the court was without authority, and that such judgment might be attacked at any time and in any proceeding. It further held that the right of naturalization, being restricted to free white persons, to aliens of African nativity, and to persons of African descent, a native of Japan was not entitled to citizenship (Rec., p. 7).

The sole question involved on this appeal, therefore, is whether or not the State court, in naturalizing the two petitioners, acted without jurisdiction, because (1) its jurisdiction was limited to the naturalization of *(a)* free white persons *(b)* aliens of African nativity and *(c)* persons of African descent; and (2) because a native of Japan does not fall within any of these categories.

Assignment of Error.

Petitioners submit that the Supreme Court of the State of Washington erred in holding that the Superior Court of Washington was without jurisdiction to naturalize these petitioners, and that these petitioners were not "free white persons" within the meaning of the Act of Congress applicable to naturalization.

Argument.

A. Judicial Authorities.

The statute in force at the time of the issue of certificates of naturalization to these petitioners was Title XXX of the U. S. Revised Statutes, entitled "Naturalization," enacted in 1873-4, as amended by the Act of February 18, 1875, 18 Stat. 316, and as revised in 1878. Prior to the Revised Statutes, the various Acts of Congress providing for naturalization, beginning with the first act, namely, that approved March 26, 1790 (1 Stat. 103), provided for the naturalization of "any alien, being a free white person," who should meet the requirements of the Act. (See also Act of January 29, 1795, 1 Stat. 414; Act of April 14, 1802, 2 Stat. 153, as supplemented by Act of May 26, 1824, 4 Stat. 69). Certain exceptions to this limitation were contained in Acts providing for the naturalization of "any alien" who should have served in the army or navy, or as a seaman on a merchant ship of the United States (see Act of July 17, 1862, 12 Stat. 594, 597; Act of June 7, 1872, 17 Stats. 262, 268).

By an Act passed July 14, 1870 (16 Stats. 254), it was provided

> "that the naturalization laws are hereby extended to aliens of African nativity and to persons of African descent."

In the codification of the statutes into the first revision, enacted 1873-4, the words "being a free white person," were dropped out of the first section in Title XXX dealing with naturalization, and a section, numbered 2169, was inserted, reading:

> "The provisions of this title shall apply to aliens of African nativity and to persons of African descent."

On February 18, 1875, an Act (18 Stat. 316) was passed to correct errors and supply omissions in the Revised Statutes, which amended Section 2169 by inserting in the first line after the word "aliens," the words "being free white persons, and to aliens" (p. 318), so that the section thereafter should read:

> "The provisions of this title shall apply to aliens, being free white persons, and to aliens of African nativity and to persons of African descent."

Between December 31, 1873, and February 18, 1875, therefore, there was no restriction whatever respecting race, origin or color of applicants for naturalization, and during this period, it was held that Chinese were eligible to citizenship.

> *In re Ah Yup*, 5 Sawyer, 155; Fed., Cas. No. 104;
> *In re Ah Chong*, 2 Fed., 733, 739.

The general law applicable to naturalization, aside from the exceptional cases of seamen and soldiers, remained unchanged in applying only to aliens being white or of African nativity or of African descent until after the issuance of citizenship papers to the petitioners in May, 1902. As it is admitted that the petitioners were not of African nativity or of African descent, the question arises whether, being natives of Japan, they come within the general description of "free white persons," within the meaning of the statute. These words for years have given rise to great confusion in their interpretation by the Circuit and District Courts of the United States.

Circuit Judge Lowell, in admitting to naturalization a Syrian, born in Damascus, as a "white" person, held, that cases of difficulty were likely to arise in construing Section 2169, unless its wording be changed, and the

intent of Congress made to appear. *In re Hudson*, 179 Fed., 665, that section, he said,

> "implies a classification of some sort. What may be called for want of a better name the Caucasian-Mongolian classification is not now held to be valid by any considerable body of ethnologists. To make naturalization depend upon this classification is to make an important result depend upon the application of an abandoned scientific theory, a course of proceeding which surely brings the law and its administration into disrepute. Since it is impossible to substitute a modern and accepted theory for one which has been abandoned. No modern theory has gained general acceptance. Hardly any one classifies any human race as white, and none can be applied under Section 2169 without making distinctions which Congress certainly did not intend to draw; *e. g.*, a distinction between the inhabitants of different parts of France. Thus, classification by ethnological race is almost or quite impossible. On the other hand, to give the phrase 'white person' the meaning which it bore when the first naturalization act was passed, viz., any person not otherwise designated or classified, is to make naturalization depend upon the varying and conflicting classification of persons in the usage of successive generations and of different parts of a large country. The court greatly hopes that an amendment of the statutes will make quite clear the meaning of the word 'white' in Section 2169" (p. 667).

The hope thus expressed has not been realized, and Congress has done nothing to clarify the meaning of the phrase "white person" in the naturalization law, even in the general revision of that law enacted in 1906 or the amendment of 1920. That in 1790, when the first Act was passed, the intention of Congress was to discriminate between the negroes, persons of African birth or descent, on the one hand, and all other immigrants coming to the country, would seem to be obvious. In a very

learned and closely reasoned opinion by Circuit Judge LOWELL, *In re Halladjian*, 174 Fed., 834, the learned Judge says (p. 841):

> "If we pass from racial speculation and remote history to the usage of the colonies and of the United States in statutes and in official documents, the interpretation of the word 'white' will be found less difficult. In this interpretation the statutes for taking the census and the actual classification employed therein are instructive. A census, dealing with all inhabitants (except untaxed Indians in some cases), cannot discriminate against any inhabitant by omission. The Massachusetts census of 1764 classified the inhabitants of the province as whites, negroes an d mulattoes, Indians and 'French neutrals.' The Rhode Island census of 1748 as whites, negroes and Indians; that of 1774 as whites, blacks and Indians. The Connecticut census of 1756 classified the persons enumerated as whites, negroes and Indians; that of 1774 as whites and blacks. The blacks were classified as negroes and Indians. The New York census of 1698 classified the persons enumerated as men, women, children and negroes; that of 1723 as whites, negroes, and other slaves; those of 1731, 1737, 1746, 1749, 1756 and 1771 as white and black; that of 1786 as whites, slaves and 'Indians who pay taxes.' The New Jersey census of 1726 classified the persons enumerated as whites and negroes; that of 1737-38 as whites, negroes, and other slaves. The Maryland census of 1755 classified the persons enumerated as whites and blacks. A Century of Population Growth in the United States, published by the Department of Commerce and Labor in 1909, chapter on White and Negro Population, and Enumerations of Population in North America prior to 1790, 'The population of the earliest English settlements in America,' so the chapter opens, 'was composed of two elements, white and negro. These two elements, though subject to entirely different conditions, continue to compose the population of the republic.' Page 80. Here, again, 'white' is made to include all persons not otherwise specified.

"The census act of 1790 (Act March 1, 1790, c. 2, 1 Stat. 101), provided for a census of all the inhabitants of the United States, except Indians not taxed. These inhabitants were to be classified by 'color,' and the schedule provided by the statute made a classification as free whites, other free persons, and slaves. It is evident from the government publication just quoted that the phrase 'other free persons' was construed to mean 'free negroes,' and this was substantially the classification made in the censuses taken in the first half of the nineteenth century. Act May 23, 1850, c. 11, 9 Stat. 428, 433, for the taking of the seventh and subsequent censuses, provided in the statutory schedule for a classification of free inhabitants by color as 'white, black, or mulatto.' In the census of 1860 the classification was 'white, free colored and slaves,' and the class 'free colored' was subdivided between blacks and mulattoes. Rev. St. Sec. 2206, provided for census schedules classifying all inhabitants of the United States by color as 'white, black, or mulatto,' although there appears to have been special provision for the enumeration of Indians (Act March 1, 1889, c. 319, Sec. 9, 25 Stat. 763), and the enumeration was made accordingly. 'For the censuses from 1790 to 1850, inclusive, the population was classified as white, free negro, and slave only, while for the censuses from 1860 to 1890, inclusive, the population included, besides the white and negro elements, the few Chinese, Japanese, and civilized Indians reported at each of these censuses.' Eleventh Census, part I, p. xciv. In fact, the classification was not uniform in all parts of the country. Census Act March 3, 1899, c. 419, Sec. 7, 30 Stat. 1014 (U. S. Comp. St. 1901, p. 1339), provided for a classification of inhabitants by 'color,' and appears to have left the preparation of schedules to the director of the census. The classification employed, in some instances at least, was as whites, negroes, Indians, Chinese and Japanese. In other instances 'colored,' as opposed to 'white,' was used to include negroes, Chinese, Japanese, and Indians. Throughout the chapter cited in the above-mentioned Bulletin, it is assumed that all persons not

classified as white, in the first eight federal censuses at any rate, were negroes or Indians.

"This use of the word 'white,' which has been illustrated from the censuses, both colonial and federal, is further exemplified in modern statutes, requiring separate accommodation in travel. A statute of Arkansas requires separate accommodation for the 'white and African races,' and provides that all persons not visibly African 'shall be deemed to belong to the white race.' Acts 1891, p. 17, c. 17, Sec. 4. See, also, Laws Fla., 1909, p. 39, c. 5893; Acts Va. 1902-1904 (Extra Sess.), p. 987, c. 609, subc. 4 (Code 1904, Sec. 1294d); Civ. Code S. C. 1902, sec. 2158. Concerning the use of the word 'white' in treating of schools, see Civ. Code S. C. 1902, sec. 1231; Ky. St. 1909 (Russell's) secs. 5607, 5608, 5642, 5765 (Ky. St. 1909, secs. 4523, 4524, 4428, 4487). The recent Constitution of Oklahoma (article 23, sec. 11) reads as follows:

" 'Whenever in this Constitution and laws of this state the words 'colored' or 'colored person,' 'negro' or 'negro race' are used, the same shall be construed to mean to apply to all persons of African descent. The term 'white race' shall include all other persons.'

"References like those made above could be multiplied indefinitely.

"From all these illustrations, which have been taken almost at random, it appears that the word 'white' has been used in colonial practice, in the federal statutes, and in the publications of the government to designate persons not otherwise classified. The census of 1900 makes this clear by its express mention of Africans, Indians, Chinese, and Japanese, leaving whites as a catch-all word to include everybody else. A similar use appears 130 years earlier from the provincial census of Massachusetts taken in 1768, where 'French neutrals' are not reckoned as white persons, notwithstanding their white complexion. Negroes have never been reckoned as whites; Indians but seldom. At one time Chinese and Japanese were deemed to be white, but are not usually so reckoned today. In passing the Act of 1790 Congress did not concern itself particularly with Armenians,

> Turks, Hindoos, or Chinese. Very few of them were in the country, or were coming to it, yet the census taken in that year shows that everybody but a negro or an Indian was classed as a white person. This was the practice of the federal courts. While an exhaustive search of the voluminous records of this court, sitting as a court of naturalization, has been impossible, yet some early instances have been found where not only western Asiatics, but even Chinese, were admitted to naturalization. After the majority of Americans had come to believe that great differences separated the Chinese, and later the Japanese, from other immigrants, these persons were no longer classified as white; but while the scope of its inclusion has thus been somewhat reduced, 'white' is still the catch-all word which includes all persons not otherwise classified."

As a result of his consideration of the subject, the learned Judge found that there is no European or white race, and no Asiatic or yellow race, which includes substantially all the people of Asia; that Armenians had always been reckoned as Caucasians and white persons, and he concluded as follows:

> "We find, further, that the word 'white' has generally been used in the federal and in the state statutes, in the publications of the United States, and in its classification of its inhabitants, to include all persons not otherwise classified; that Armenians, as well as Syrians and Turks, have been freely naturalized in this court until now, although the statutes in this respect have stood substantially unchanged since the First Congress; that the word 'white,' as used in the statutes, publications, and classification above referred to, though its meaning has been narrowed so as to exclude Chinese and Japanese in some instances, yet still includes Armenians. Congress may amend the statutes in this respect. To provide more specifically what persons may be admitted to citizenship seems desirable. While the statutes are unchanged, without proof, if proof be admissible, that the meaning

> of the word 'white' has been still further narrowed, this court will not deny citizenship by reason of their color to aliens who, like the Armenians, have hitherto been granted it."

Judge MAXEY, in the District Court in Texas, in May, 1897, holding that native citizens of Mexico were eligible to American naturalization, said:

> "Indeed, it is a debatable question whether the term 'free white person,' as used in the original act of 1790, was not employed for the sole purpose of withholding the right of citizenship from the black or African race and the Indians then inhabiting this country" *(In re Rodriguez,* 81 Fed., 337).

He held that while, if the strict scientific classification of the anthropologists should be adopted, the Mexican petitioner probably would not be classed as white, he certainly was not a person of African descent, and referring to the Treaty of 1848 with Mexico and the various statutes regarding naturalization of Mexican inhabitants of the territory ceded to the United States, he reached the conclusion that a Mexican was to be considered as a "free white person" within the meaning of the Act of Congress.

Judge BLEDSOE, in the Southern District of California (*In re En Sk Song,* 271 Fed., 23); Judge NEWMAN, in the Northern District of Georgia (*In re Najour,* 174 Fed., 735); Judge WOLVERTON, in the District of Oregon (*In re Ellis,* 179 Fed., 1002), and Judge LOWELL, in the District of Massachusetts (*In re Mudarri,* 176 Fed., 465), have all held that a Syrian was a "white person," within the meaning of the Act of Congress, and, therefore, entitled to naturalization, although disagreeing in the reasoning by which this result was reached.

In *Dow* v. *U. S.,* 226 Fed., 145, the Circuit Court of Appeals for the Fourth Circuit, overruling the District Judge, who had held that "free white persons" included only aliens of European nativity or descent, and holding

a Syrian entitled to naturalization, said, per Woods, *C. J.*, that whatever the general understanding of the term in 1790 might have been, there was no doubt that the meaning had been broadened at the time of the various amending and codifying acts, and that at the time of the amendment of 1875,

> "the generally received opinion was that the inhabitants of a portion of Asia, including Syria, were to be classed as white persons."

The learned Judge said that doubtless when the first Act was passed in 1790, it

> "was intended mainly to provide for naturalization of aliens from Europe, and to deny naturalization to negroes. With other peoples this country had little intercourse and little concern. Accordingly the records of Congress indicate that the debates on the bill of 1790 related to European immigration. It is reasonably certain that Congressmen had no knowledge of Blumenbach's classification of the races of men published in 1781, in which he makes one of the divisions the white or Caucasian race and includes in it 'the western Asiatics on this side of the Caspian Sea and the Ganges'; for his work was not translated from the German and published in English until 1807. The science of ethnology had made little advance in 1790, and the notion of racial division and the meaning of the term 'white' in a comprehensive sense as applied to men were probably quite vague and indefinite in the minds of legislators. Yet in not mentioning the people of Europe, and in extending the privilege of naturalization to any 'free white person,' it seems reasonable to think that the Congress must have believed that there were white persons natives of countries outside of Europe. The writers on the subject of that day, to say the least, were not agreed in the view that Europeans were the only white people" (p. 146).

The Court then pointed out the progress of the science of ethnology, and stated that even if the Congress of

1790 considered that the law of that year would be understood to allow the naturalization of persons of European nativity or descent only, the legislators of later years could not have supposed that the term "free white persons" would carry that restricted meaning; and that at the date of the amendment of 1875, it would seem to be true beyond question that the generally received opinion was that the inhabitants of a portion of Asia, including Syria, were to be classed as white persons.

Judge WOLVERTON, in *In re Ellis*, 179 Fed., 1002, expressed the opinion that the words "'free white persons' are devoid of ambiguity and are of plain and simple signification"—which is rather extraordinary in view of the varying opinions expressed by other Judges.

Judge NEWMAN, in the *Najour* case (174 Fed., 735), held that Syrians belonged to the white or Caucasian race, or to "what we recognize and what the world recognizes as the white race." On the other hand, in two learned opinions, Judge SMITH, in the District of South Carolina, held that Syrians were not entitled to naturalization, and could not be considered as "free white persons" within the meaning of the naturalization acts. *In re Dow*, 211 Fed., 486; on reargument, 213 Fed., 355. The opinion in 211 Federal is a thorough and learned summary of the question in the light of the modern science of ethnology. He rejected, in accordance with the great weight of authority under the decisions of this country, the proposition that the words "free white persons" as applied to an applicant, were to be determined by *ocular* inspection by the court. He also rejected the definition as a *racial* designation, saying:

> "If racial, is any one entitled to be admitted who belongs to a nation that speaks one of the languages spoken by the peoples heretofore denominated Caucasian, whether or not his color be the very reverse of white. This would mean the admission of all the mixed Asiatic races which speak a tongue the descendant of one of the so-

called Indo-European tongues, whether that tongue may have been forced upon them or inherited by a very mixed transmission in point of race. The dark colored, in fact, almost black, inhabitants of Ceylon, speak the Sinhalese language, which is one of the dialects of that branch of the ancient Indo-European language known as Sanscrit, and the dark colored inhabitants of the Persian Gulf or Persian Coast speak a tongue which appears to be the descendant of the ancient Iranian" (p. 487).

He adopted what he termed the *geographical* definition, namely, that the word "white," as used in the statute, referred to the peoples who were then commonly known in this country as the peoples inhabiting Europe, and whose descendants at the time of the passage of the Act of 1790 formed the inhabitants of the United States, excluding from such consideration the African descendants who were then slaves.

On reargument, he pointed out that ethnologists and philologists do not agree as to who are the white races.

> "They will rank different peoples as 'Aryans' or 'Indo-Europeans' or 'Semites' or 'Hamites,' differing even as to who are included in these; but when it comes to 'white' no agreed classification exists. The term white is generally joined to some other by the word 'or' viz., Aryans or white races, etc." (213 Fed., 360).

After a review of the history of the races, he concludes that it is a matter of futile speculation.

> "The broad fact remains," he says, "that the European peoples taken as a whole are the fair skinned or light complexioned races of the world, and form the peoples generally referred to as 'white' and so classed since classification based on complexion was adopted. ALL OF WHICH FOREGOING DISCUSSION MAY SEEM WHOLLY OUT OF PLACE IN A REASONED LEGAL OPINION AS TO THE CONSTRUCTION OF A STATUTE,—EXCEPT AS ILLUSTRATING THE

> SERBONIAN BOG INTO WHICH A COURT OR JUDGE WILL PLUNGE THAT ATTEMPTS TO MAKE THE WORDS 'WHITE PERSONS' CONFORM TO ANY RACIAL CLASSIFICATION" (213 Fed., 364).

The real question, he concluded, was:

> "What does the statute mean, to whom did the terms 'free white persons' refer in 1790, in the understanding of the makers of the law?"

A consideration of this question (see pp. 365-6) led him to the conclusion that the test is mainly one of geography.

> "Is the applicant from Europe and a member of the peoples inhabiting Europe, and there regarded as white, or a descendant of an emigrant from them? If he is, he is entitled to naturalization if he be otherwise fit for it. If he is not, if he is an Asiatic, whether Chinese, Japanese, Hindoo, Parsee, Persian, Mongol, Malay, or Syrian, he is not entitled to the privilege of naturalization, no matter what his fitness otherwise may be" (213 Fed., 366).

In contrast with Judge SMITH's conclusion, Judge BLEDSOE, in the District Court for the Southern District of California (*In re Mohan Singh*, 257 Fed., 209), and Judge RUDKIN, in the Eastern District of Washington (*In re Akhay Kumar Mozumdar*, 207 Fed., 115), held that high caste Hindoos were entitled to naturalization, being members of the Aryan race.

Judge BLEDSOE, reviewing the history of the naturalization act, says:

> "There is nothing that I can discover to indicate anywhere that either the colonies originally or the United States government later, when the federal statute was first passed, had in mind the exclusion from citizenship of any other persons than those referred to, to wit, negroes, Indians, and unfree whites" (257 Fed., 211).

He held that the terms white and Caucasian were interchangeable, and that the preponderance of opinion includes Hindoos of India as members of the Aryan branch or stock of the so-called Caucasian or white race.

Judge RUDKIN, in the *Mozumdar* case, held that whatever the original intent might have been,

> "it is now settled, by the great weight of authority, at least, that it was the intention of Congress to confer the privilege of naturalization upon members of the Caucasian race only."

This intent he infers, not from any contemporary evidence, but wholly from decisions in the courts of the United States, the earliest of which is that of Judge SAWYER, in the *Ah Yup* case, decided 1878 (5 Sawyer, 155). On the other hand, Judge DICKINSON, in the District Court for the Eastern District of Pennsylvania, held that a Hindoo was not entitled to naturalization (*In re Sadar Bhagwab Singh*, 246 Fed., 496). He rejected the test of ocular inspection of color and the test of philological or ethnological authority. The general idea of his opinion seems to be that Congress had a certain notion in the use of the term "free white persons," which did not originally include even members of the Latin races, but which gradually was expanded to embrace French, Spanish, Portuguese, and others, and even Hebrews. This he termed the historical interpretation. He says that this term means

> "that Congress chose its word for the purpose of describing, so far as could be done, although in very general terms, and therefore vaguely, the class, the members of which might enjoy the privilege of citizenship and imposed upon the courts the duty of determining whether the individual applicant belonged to that class. Its further and final meaning, with which we are now concerned, is that the courts may admit to citizenship any person found to belong to that designated class, but no power, except that of Congress, can enlarge that class" (p. 499).

It is a little difficult to follow this reasoning, because the Judge, himself, does not seem to have a very clear idea about it. In general, it would seem to be his idea that the term embraced those different kinds of peoples who, from time to time, according to the general popular opinion, were regarded as the kind of people who ought to be made citizens of the United States. They were to be considered "white," if at the moment there was no general prejudice against them. They were not "white," if at the time there was a general public feeling that they were not desirable. This is perhaps an extreme interpretation, and yet no more exact rule would seem to be deducible from Judge DICKINSON's reasoning.

A Parsee merchant was admitted to naturalization by Judge LACOMBE in the Southern District of New York (*In re Balsara*, 171 Fed., 294), and his order affirmed by the Circuit Court of Appeals (180 Fed., 694). Judge WARD, in writing the opinion of the Circuit Court of Appeals, rejects the historical interpretation and holds that Congress intended by the words "free white persons" to confer the privilege of naturalization upon members of the white or Caucasian race only. "Doubtless," he says,

> "Congressmen in 1790 were not conversant with ethnological distinctions and had never heard of the term 'Caucasian race' mentioned in some of the foregoing decisions. They probably had principally in mind the exclusion of Africans, whether slave or free, and Indians, both of which races were and had been objects of serious public consideration. The adjective 'free' need not have been used, because the words 'white persons' alone would have excluded Africans, whether slave or free, and Indians. Still effect must be given to the words 'white persons.' The Congressmen certainly knew that there were white, yellow, black, red and brown races. If a Hebrew, a native of Jerusalem, had applied for naturalization in 1790, we cannot believe he would have been excluded on the ground that he was not a white person, and, if

> a Parsee had applied, the Court would have had to determine then just as the Circuit Court did in this case, whether the words used in the Act did or did not cover him" (p. 695).

What a court would have done at that time if a Mexican or a Syrian were to have applied, is not considered, but the court adopted squarely the classification of races by color, and considered the Parsee as included in the white race.

Judge COLT, in the District of Massachusetts in June, 1894 (*In re Saito*, 62 Fed., 126), held that a native of Japan, whom he denominated as of the Mongolian race, was not entitled to naturalization. He considered the words "white persons," which were incorporated in the naturalization laws as early as 1802, saying:

> "At that time the country was inhabited by three races, the Caucasian or white race, the Negro or black race, and the American or red race. It is reasonable, therefore, to infer that when Congress, in designating the class of persons who could be naturalized, inserted the qualifying word 'white,' it intended to exclude from the privilege of citizenship all alien races except the Caucasian."

This definition would lead to an inquiry as to the origin of all the peoples inhabiting the United States in 1802, and members of all nationalities or races then here who were not red or black would become eligible to naturalization. A perhaps stronger argument against the petitioners was advanced by Judge COLT in referring to the history of the Act of 1870 extending the privilege of citizenship to colored persons, and the proposal of Charles Sumner in 1870 to strike the word "white" from the naturalization statute, which was opposed upon the ground, among others, that the omission of this word would operate to extend naturalization to all classes of aliens and especially to Asiatics. Judge COLT also referred to Blumenbach's classification of mankind into five

principal types: The Caucasian or white, Mongolian or yellow, Ethiopian or black, American or red, and Malay or brown, simplified by Cuvier into Caucasian, Mongol and Negro, or white, yellow and black races, as well as to Professor Huxley's division into five types, viz.: Australoid (chocolate brown), Negroid (brown black), Mongoloid (yellow), Xanthochroic (fair whites), and Melanochroic (dark whites), the fair whites being the prevalent type of inhabitants of Northern Europe, and the dark whites of Southern Europe.

Judge Bledsoe, in the Southern District of California, refused naturalization to a native of Korea, a subject of Japan, who had served in the great war, and was honorably discharged (*In re Ko Sik Song*, 271 Fed., 23). The discussion in his opinion was limited largely to the effect of legislation subsequent to the Revised Statutes, and the interpretation of the phrase "white persons" was not discussed.

Judge Van Valkenburgh, in the Eastern District of Missouri (*In re Knowrk Emory Chan*, 272 Fed., 207), in denying naturalization to a native of Korea, a subject of Japan, who had served in the United States Army and had been honorably discharged, because he held the case governed by Section 2169 of the Revised Statutes, said the meaning of that section

> "has become so far clarified by late judicial decisions that we are confronted by no embarrassment in determining the question of color in so far as that controls. In *ex parte Dow* (D. C.) 211 Fed., 486, and *in re Dow* (D. C.) 213 Fed., 355, it was held that the words do not mean a person white in color, nor do they designate racial distinction, meaning Caucasian or Indo-European, but are to be construed rather as a geographical term, referring to the peoples who were commonly known in the United States as those inhabiting Europe, and whose descendants at the time of the passage of the Act of 1790 formed the inhabitants of the United States, excluding Africans. * * * In accordance with numerous holdings, the term includes, as com-

monly understood, all European races and those Caucasians belonging to the races around the Black Caucasian Sea, whether they are considered as fair whites or dark whites, and though certain of the eastern and southern European races are technically classified as of Mongolian or Turkic origin. Generally speaking, 'free white persons' includes members of the white or Caucasian race as distinct from the black, red, yellow, and brown races.

"Whether or not historically the term 'Caucasian' is accurate as a designation of the white race, it is a term which appeals to common understanding and to that of the lawmakers with practical definiteness, and the term 'white person' may now be said to have a well understood meaning."

Notwithstanding what some of these learned judges have said as to the sufficiency and clearness of the statutory definition, Congress did not rely upon it in dealing with the Chinese, but by the Act approved May 6, 1882, Section 14 (22 Stat. 58) enacted

"That hereafter no state court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed."

B. Scientific Authorities

The weight of scientific authority as more clearly the subject than have the varying judicial decisions.

Nelson's Perpetual Loose Leaf Encyclopedia (New York, 1921), under the title Ethnology, states:

"Opinions still differ both as regards the number and the interrelations of the primary divisions (of mankind). But the tendency now is to accept Sir Henry Flower's four groups (Negro, Mongolic, American and Caucasic) as fundamental, and to consider these, not as four distinct species, but only as four marked varieties of a single species of the genus homo."

Quatrefages' Histoire Générale des Races Humaines (Paris, 1889) divides the fundamental types of the human species into the white or Caucasian, the yellow, or Mongolic, and Negro or Ethiopic, adding (p. 299):

> "Ces noms sont mauvais. Ils reposent sur des idées fausses et ont le tort de les réveiller. Il y a des Blancs aussi noirs que n'importe quels Négres. * * * Seules, les expressions de Jaune et de Mongolique ont quelque chose de fondé."
>
> ("These names are not good. They rest on false ideas, and it is wrong to revive them. There are whites as black as any negroes. Only the expressions yellow and Mongolian have any basis.")

Brinton's classification is based largely on hair, that is, the races having black wavy hair, black wooly hair, straight dark hair or light curly hair. He maintains that the white race is geographically and historically an African race, and that the purest types of whites always have been found in greatest numbers in Western Europe and Northwestern Africa. (Races and Peoples, by Daniel G. Brinton, Philadelphia, 1901, pp. 97-100, 105-112.) He divides the Mongolian race into two great branches, the Sinitic and the Sibiric, classifying the Japanese under the latter, and says:

> "There is an undoubted white strain in Japan. The Ainos, the earliest inhabitants of Japan, are one of the most truly Caucasian like people in appearance in Eastern Asia. * * * The 'fine' type of the aristocracy, the Japanese ideal, as distinct from the 'coarse' type recognized by students of the Japanese of today, is perhaps due to the Aino."

In the dictionary prepared by the Immigration Commission, published as Volume 5, Senate Document No. 662, 61st Congress, Third Session, it is stated:

> "The number of the chief divisions or basic races of mankind is more in dispute at the present time than when Linnaeus proposed to classify them into four or Blumenbach into five great

> races. * * * In preparing this dictionary, however, the author deemed it reasonable to follow the classification employed by Blumenbach which school geographies have made most familiar to Americans, viz., the Caucasian, Ethiopian, Mongolian, Malay and American, or, as familiarly called, the white, black, yellow, brown and red races."

The Japanese are stated to stand much nearer than the Chinese, especially in language, to the Finns, Lapps, Magyars and Turks of Europe, who are the westernmost descendants of the Mongolian race.

Kingsley, in "Natural History of Man" (Boston, 1885), says:

> "The Japanese fall into two tribes, the real Japanese and the Aino. The former is a mixed people of immigrant Mongolian races and the autochthonous population whom Japanese history calls Emishi. The latter, though not identical with the Aino, are related to them. * * * Thus we find three ethnic elements: 1. The Aino, the original inhabitants of central and northern Japan. 2. A Mongolian tribe, like the better class of Chinese and Koreans, who settled in the southwestern part of the island. 3. A Malay like tribe, who first settled in the south, and then gradually spread over the whole island and conquered it" (p. 433).

Keans, "Man, Past and Present" (Cambridge, 1920), considers that the characteristics of the hair form the most satisfactory basis for a classification of mankind. Hence, he divides man into three main varieties of hair, called straight, wavy and wooly. Deniker, in "The Races of Man," adds a fourth, frizzy. Color he regards as of much less importance, and he points out that in Japan the unexposed parts of the body are generally white.

Conclusion.

The fact is, therefore, that Congress in repeating without qualification the words "white persons" has left the subject in great uncertainty. All authorities without exception agree on dismissing the idea of white as a characteristic to be demonstrated by ocular inspection. If it is sought to interpret it as an ethnological term, authorities are so conflicting that it opens the way to serious inequalities of application. To apply the ambulatory definition which some of the learned judges have adopted, is to rob the law of all definiteness and to leave it to the whim of the particular judge or court. The only safe rule to adopt is to take the term as it undoubtedly was used when the naturalization law was first adopted, and construe it as embracing all persons not black, until the Act of 1870, and after that date, as having no practical significance. If this would run counter to the intention of Congress, that body can readily amend the Act so as to make clear the legislative intention. But the subject certainly should not be left in the uncertain state in which it now is. So far as the petitioners in the present case are concerned, all that appears is that they were born in Japan and that they were duly naturalized by a state court in 1902. Every intendment of fact in favor of the jurisdiction therefore must be presumed. They may have been pure blooded Ainos, and as such "Caucasian" within the meaning of that term, as employed by most of the ethnologists and in a majority of the decisions construing the term "white persons" to mean those of the Caucasian race, so that in any event the judgment of the lower court must be reversed.

Petitioners therefore respectfully urge that the judgment of the Supreme Court of the State of Washington be reversed and the cause remanded with directions that the writ issue.

CORWIN S. SHANK,
Attorney for Petitioners.

GEO. W. WICKERSHAM,
of Counsel.

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CASES CITED

IN THE

Supreme Court of the United States

October Term, 1922

TAKUJI YAMASHITA and CHARLES HIO KONO,
Petitioners,

against

J. GRANT HINKLE, as Secretary of State of the State of Washington,
Respondent.

No. 177

On Writ of Certiorari to the Supreme Court of the State of Washington.

SUPPLEMENTAL BRIEF FOR PETITIONERS.

Statement.

With this case is to be argued the case of *Ozawa* v. *United States*, Docket No. 1. There has been filed in the *Ozawa* case a brief prepared by the late Mr. Withington, in which there is a thorough discussion of principles wholly germane to the instant case. Counsel have, therefore, deemed it expedient, for convenience of reference, to reprint *in extenso* Mr. Withington's brief as a supplement to the brief prepared by them herein.

Supreme Court of the United States

October Term, 1922

No. 1

TAKAO OZAWA v. THE UNITED STATES.	*On a Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.*

BRIEF FOR PETITIONER.

This case comes here on a certificate from the United States Circuit Court of Appeals for the Ninth Circuit, the case having come to that court, both on appeal and by writ of error, from a judgment denying the petition of said Takao Ozawa for citizenship.

At the trial in the United States District Court of Hawaii the United States District Attorney opposed the petition because Takao Ozawa, the petitioner, was of the Japanese race and born in Japan, and not eligible to citizenship under Revised Statutes, Section 2169. The other qualifications were proved, found to be fully established, and conceded by the Government. The certificate continues:

> "The applicant had for twenty years continuously resided in the United States, including the last nine years' residence in Hawaii. He graduated from the Berkeley, California, High School, and was for nearly three years a student at the University of California, until it was closed by the earthquake in 1906. He has educated his children in American schools and he and his family have

attended American churches, and he has maintained the use of the English language in his home. He presented two briefs of his own authorship, which are ample proof of his qualification, by education and character.

"The court found that the contention of the United States District Attorney is correct and that, although the applicant was eligible for citizenship in every other respect, yet having been born in Japan and being of the Japanese race, as a matter of law he was not eligible to naturalization, and denied the petition, to which petitioner excepted."

Questions of Law Concerning Which the Circuit Court of Appeals Desires the Instruction of This Court.

1.

Is the Act of June 29, 1906 (34 Stat. at Large, Part 1, page 596), providing "for a uniform rule for the naturalization of aliens," complete in itself, or is it limited by Section 2169 of the Revised Statutes of the United States?

2.

Is one who is of the Japanese race and born in Japan eligible to citizenship under the Naturalization laws?

3.

If said Act of June 29, 1906, is limited by said Section 2169 and naturalization is limited to aliens being free white persons and to aliens of African nativity and to persons of African descent, is one of the Japanese race, born in Japan, under any circumstances eligible to naturalization?

These questions really are two in number, and restated are:

1. Is the Act of June 29, 1906, complete in itself, and does it provide what it declares, "a uniform rule for the naturalization of aliens"?

2. If the Act of June 29, 1906, is limited by Section 2169 so that naturalization is limited to aliens being free white persons and to aliens of African nativity and to persons of African descent, is one of the Japanese race, born in Japan, *under any circumstances* eligible to naturalization?

Canons of Construction.

The solution of the questions certified to this court is, we apprehend, governed by:

1. The constitutional direction to Congress to establish an uniform rule of naturalization, and the co-ordinate public duty to enact plain and adequate legislation to carry out this provision.

2. The course of legislation. What Congress has done to establish this uniform rule.

3. The general scope of that legislation, and the declared policy of the United States in converting aliens into citizens, involving the whole field of legislation in reference to immigration as well as naturalization, and the ascertainment of the class of aliens Congress has determined to be fit for citizenship.

4. Does the Act of June 29, 1906, establish a uniform rule of naturalization and is it complete in itself?

5. Where a statute which has had an accepted meaning is re-enacted, should words of the re-enacted statute be taken in their hitherto accepted sense?

6. In determining whether words are to receive the accepted sense of the original enactment, or their meaning at the time when re-enacted, is the fact that the words,

taken in the latter sense, have no definite meaning, and that in judicial construction none has been found, persuasive that the meaning attached to them under the original enactment must be given?

7. Where the re-enactment purports to be a correction of an error in omitting the original enactment in a revision is this a further consideration for giving to the words their meaning at the time when originally enacted?

8. Should opinions of courts of inferior jurisdiction, although many in number, giving new constructions to the language of the re-enactment, be persuasive with the court, when based on no uniform rule, furnishing no common test, the rules in some cases based on race, in others on locality of origin, which test of locality and of race varies with the court, in determining a provision of law which deals simply with persons and with color, excepting so far as it applies to persons of African nativity and descent?

9. It should be assumed that Congress, in dealing with the great boon of citizenship in this land of the free and refuge of the oppressed, was frank and outspoken in its legislation and not sidestepping any difficulty or legislating by indirection where it feared to legislate directly.

10. The fact that the Japanese are a free people, that their root stock, like that of the Polynesian, is of the white race, and that while Mongolian and Malay types are found amongst the Japanese, the Caucasian or white type is as prevalent.

11. The question is not whether some or most of the Japanese can not be naturalized, but whether all Japanese even if of the Caucasian or white race can not be naturalized.

ARGUMENT.

I.

The Act of June 29, 1906, establishes a Uniform Rule of Naturalization, and that rule is not controlled or modified by Section 2169.

(a) The constitutional grant of power, the title of the act, its scope and terms, show that, save in definitely excepted cases, it is a complete, exclusive and uniform rule of naturalization.

Article I, Section 8, of the Constitution of the United States provides:

> "The Congress shall have Power * * *
> "*To establish an uniform Rule of Naturalization* * * *
> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, * * * *"

Chirac v. *Chirac*, 2 Wheat, 259;
Dred Scott v. *Sanford*, 19 How., 393;
Boyd v. *Nebraska*, 143 U. S., 135;
United States v. *Wong Kim Ark*, 169 U. S., 649;
Johannessen v. *United States*, 225 U. S., 227;
Luria v. *United States*, 231 U. S., 9.

Congress exercised this power in the first Congress, in the second session, and passed the Act of March 26, 1790 (1 Stat. L. 103), entitled:

> *"An Act to establish an uniform rule of naturalization."*

This Act was repealed by a like Act with a like title in 1795, and that by the Act of April 14, 1802 (2 Stat. L. 153), which in turn was entitled:

> *"An Act to establish an uniform rule of naturalization."*

This in turn became Title XXX of the Revised Statutes of the United States, which comprised the uniform rule of naturalization until the passage of the Act of June 29, 1906, which purports to be and is entitled:

> "An Act *to establish* a Bureau of Immigration and Naturalization, *and to provide for a uniform rule for the naturalization of aliens throughout the United States.*"

This court has said in construing an Act defining its jurisdiction, which is derived from the Constitution:

> "The Constitution and the laws are to be construed together."
>
> *Durousseau* v. *United States,* 6 Cranch 307.

And of this very power this court said in the *Wong Kim Ark* case:

> "The simple power of the national legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as it respects the individual."
>
> *United States* v. *Wong Kim Ark, ubi supra,* p. 703.

This Act purports to be a complete Act. It provides in Section 3 for exclusive jurisdiction of naturalizing aliens, and in Section 4,

> "that an alien may be admitted to become a citizen of the United States in the following manner, and *not otherwise,*"

followed by five paragraphs prescribing the conditions of admission, among which, in paragraph two, that the petition shall set forth

> *"every fact material to his naturalization and required to be proved upon the final hearing of his application."*

In Section 27 the form of this petition is given, containing the allegations which Congress believed were "material to his naturalization and required to be proved," but nothing with reference to color or race.

The intent of Congress to enact a uniform rule, and that it had enacted a uniform rule, for naturalization, covering the entire subject and even giving to the rules and regulations the force of law, is clear.

In re Brefo, 217 Fed., 131.

In a case in which it is held that the special provision as to naturalization in the Organic Act of the Territory of Hawaii (Act of April 30, 1900) was inconsistent with Section 4 of the Act of June 29, 1906, and therefore repealed, the court said:

> "The title of the Act is indicative of the purpose to establish a uniform rule of naturalization throughout the United States. * * * There is no reason to presume that in enacting the later statute Congress intended to make any special provision for the naturalization of residents of Hawaii. They were not a distinct class of residents of the United States. There was no reason for bestowing special privileges upon them, as in the case of discharged soldiers and seamen, and they were under no disability to make declarations of their intention to become citizens. We think the intention was to adopt a new scheme of procedure in naturalization, and to make it uniform throughout the United States."

United States v. *Rodiek,* 162 Fed., 469.

It is interesting to note that Judge GILBERT in this case speaks of Section 2169 (unrepealed) as a section "which extends the privilege of naturalization to aliens of African nativity and to persons of African descent."

> "By this legislation a new and complete system of naturalization was adopted, all of the details of which, together with the method of procedure, and the courts having jurisdiction of it, were set forth and designated, and all acts or parts of acts inconsistent with or repugnant to its provisions were repealed."
>
> *Bessho* v. *United States*, 178 Fed., 245.

In a case holding that Section 2166 was not repealed it was said:

> "The Act of June 29, 1906, 34 St. at Large 596, commonly called the 'Naturalization Law,' was intended to provide a uniform system for the naturalization of aliens."
>
> *In re Leichtag*, 211 Fed., 681.
>
> "The act of which section 30 forms part was obviously intended to cover fully the subject of naturalization."
>
> *In re Mallari*, 239 Fed., 416;
> *Hampden County* v. *Morris*, 207 Mass., 167; 93 N. E. 579; Ann. Cases 1912 A, 815.
>
> "Prior to 1906 'the Uniform Rule of Naturalization' authorized by the Constitution was found in the Act of 1802 (2 Stat. at L. 153, chap. 28), and a few amendments thereto. This enumerated only general controlling principles. Grievous abuses having arisen, Congress undertook, by the Act of June 29, 1906 (34 Stat. at L. 596, chap. 3592, Comp. Stat. 1913, sec. 963), to prescribe 'and fix a uniform system and a code of procedure in naturalization matters.' Report Committee on Immigration and Naturalization, H. R. 1789, Feb. 26, 1906."
>
> *United States* v. *Ginsberg*, 243 U. S., 472.

This case was cited in a recent case in which the court held that a certificate of naturalization issued without filing the certificate of arrival as provided in Section 4, subdivision 2, of the Uniform Act of June 29, 1906, was invalid, the court saying:

> "A 'uniform rule of naturalization' embodied in a simple and comprehensive code under Federal supervision was believed to be the only effective remedy for then-existing abuses. And in view of the large number of courts to which naturalization of aliens was intrusted and the multitude of applicants, uniformity and strict enforcement of the law could not be attained unless the Code prescribed also the exact character of proof to be adduced."

United States v. *Ness*, 245 U. S., 319.

> "The language there employed is comprehensive and emphatic. A 'uniform rule' is provided. 'An alien' may be admitted to citizenship in the manner prescribed, 'and not otherwise.'
>
> "A wise public policy undoubtedly inspired the enactment of this law. Its intent, gathered from the unambiguous language employed, subjects all aliens to a public, drastic, and thorough examination touching their qualifications for citizenship before that priceless boon is conferred upon them. It is not our province to thwart this public policy by reading unwarranted or doubtful exceptions into the act."

United States v. *Peterson*, 182 Fed., 289, 291.

To recapitulate, the Constitution grants to Congress the power *"to establish an uniform Rule of Naturalization."* The various Acts of Congress which have exercised this power from the Act of the first Congress, March 26, 1790, have been and have purported to be Acts *"to establish an uniform Rule of Naturalization."* The Act of June 29, 1906, purports to be an exercise of the power granted by the Constitution, and purports to be

an exhaustive exercise of that power and is complete in itself.

(b) The unrepealed sections of Title XXX and a few other special acts provide for naturalization in cases excepted from the uniform law.

(1) *The decided cases so hold.*

Dealing hereafter with the effect of the Act of May 9, 1918, we observe that Section 26, the repealing clause of the Act of June 29, 1906, does not specifically repeal Sections 2166, 2169, 2170, 2171, 2172 and 2174 of Title XXX, and it has been uniformly held, although the application of the rule is not uniform, that while the Act of 1906 is a general act, as it did not repeal specific sections of Title XXX regulating the admission of special classes singled out for favor, the unrepealed portion stands covering these special cases.

In re Buntaro Kumagai, 163 Fed., 922;
In re Loftus, 165 Fed., 1002;
United States v. *Meyer,* 170 Fed., 983;
In re McNabb, 175 Fed., 511;
In re Leichtag, ubi supra;
United States v. *Lengyel,* 220 Fed., 720;
In re Sterbuck, 224 Fed., 1013;
In re Tancrel, 227 Fed., 329.

"Although the general act of 1906 expressly repealed various provisions of existing law, it made no mention of section 2166, which specially regulated the admission of honorably discharged soldiers. Congress must have intended that the admission of this class of aliens should continue to be regulated by section 2166. I do not think the two acts irreconcilable, and both should be given effect as far as possible. Congress probably regarded honorably discharged soldiers as a special class, as to whom precautions generally necessary

were not required. This would be natural as to applicants who had actually been in the service of the United States and as to whose good character the officers of the United States had certified."

In re Loftus, ubi supra.

(2) *An examination of these sections confirms this view.*

Section 2166, a re-enactment of the Act of July 17, 1862, passed during the Civil War, provides for the naturalization of honorably discharged soldiers without previous declaration and with but one year's residence, instead of five provided by existing law.

There is a similar provision originally part of the Naval Appropriation Act of July 26, 1894, Chapter 165, (28 Stat. L. 125, revised in the Naval Appropriation Act of June 30, 1914, Chapter 130, 38 Stat. L. 395), providing for the naturalization of aliens who have served an enlistment in the United States Navy or Marine Corps, and have received an honorable discharge or an ordinary discharge with recommendation for re-enlistment, without previous declaration of intention, and by the latter act without proof of residence on shore, the honorable discharge or discharge with recommendation for re-enlistment to be accepted as proof of good moral character, the service under the Act of 1894 being for five years and that under the Act of 1914 for four years.

Section 2169, under discussion, is specifically limited in its application to Title XXX, of which it is a part.

Section 2170, not expressly repealed either by the Act of June 29, 1906, or by the Act of May 9, 1918, is *functus officio,* as its provisions are covered by the fourth paragraph of Section 4 of the former Act, and its requirement of residence for five years is inconsistent with Section 2166 above referred to and Section 2174, authorizing the admission, as citizens, or seamen having served three years on board a merchant vessel, providing that such

seamen after declaration of intention and three years' service shall be deemed citizens and for the purpose of manning merchant vessels and after the declaration, be deemed American citizens for the purpose of protection.

Section 2171 is a hoary relic forbidding the naturalization of alien enemies, with reservations for those who had made declarations before the 18th day of June, 1812, or were entitled to become citizens without declaration, and the further proviso reserving the right to apprehend and remove alien enemies.

The remaining section, 2172, naturalizes the minor children of persons duly naturalized without restriction as to residence and contains a further hoary provision against those legally convicted of joining the army of Great Britain during the Revolutionary War, and another provision making children of citizens, though born out of the United States, citizens.

When the questions were certified to this court, Title XXX applied to the Army, Navy, including the Marine Corps, to alien enemies, the children of persons naturalized and to seamen.

(c) Section 2169 is not restrictive in terms and if restrictive only applies to Title XXX, revised laws and the cases excepted from the general rule.

(1) ***The history of Section 2169 shows that it was an enlarging and not a restrictive clause.***

The Act of July 14, 1870 (16 Stat. L. 256, ch. 254), declares:

> "The naturalization laws are hereby extended to aliens of African nativity and to persons of African descent."

When the Revised Statutes were enacted, the words of the existing naturalization statute, Act of April 14, 1802, were:

> "That *any alien, being a free white person,* may be admitted to become a citizen."

modified when incorporated in Section 2165 so as to read:

> "Section 2165. *An alien* may be admitted to become a citizen of the United States in the following manner, and not otherwise."

and the Act of July 14, 1870, was incorporated as a separate section, viz:

> "Section 2169: The provisions of this Title shall apply to aliens of African nativity and to persons of African descent."

When the Act to Correct Errors in the Revised Statutes (Stat. 1875, c. 18, v. 18, p. 318) was passed, attention was called to the omission of the words "being free white persons" in Section 2165, but instead of reinserting them in that section, Section 2169 was amended to read as follows:

> "Section 2169. The provisions of this Title shall apply to aliens (being free white persons and to aliens) of African nativity and to persons of African descent."

Section 2169 as originally enacted is an enlarging and not a restrictive declaration, and the introduction of the words "being free white persons and to aliens" does not change the provision from an enlarging to a restrictive one. There is nothing in the language used to show the intention of Congress to *restrict* naturalization to free white persons and Africans by this amendment. This inference, for it is nothing but an inference, is drawn entirely from the previous history of legislation and declarations on the floor of Congress, the uniform rule having previously provided only for the naturalization of "any alien being a free white person."

(2) *To hold otherwise naturalization from the passage of the Revised Statutes to the Amendatory Act of*

the 18th day of February, 1875, would be restricted to those of African nativity or descent.

If Section 2169 is restrictive then as originally enacted in the Revised Statutes it was restrictive and naturalization until the passage of the Act to correct errors was restricted to those of African nativity or descent, which is incredible.

(3) *The Chinese Exclusion Act of March 6, 1882, supports this view.*

Congress evidently took this view that the words were not restrictive and that affirmative legislation was necessary to exclude the Chinese from citizenship, for it passed the Act of May 6, 1882, which provides:

> "Sec. 14. That hereafter no State court or court of the United States shall admit Chinese to citizenship; and *all laws in conflict with this act are hereby repealed.*"

This after it had been held that the language of Section 2169 excluded the Chinese.

In re Ah Yup (1878), 5 Sawy., 155.

And a half Indian.

In re Camille (1880), 6 Fed., 256.

(4) *In any event, Section 2169 is applicable only to Title XXX and does not apply to the Act of June 29, 1906.*

It is not necessary to rest the argument on the ground just discussed, for Section 2169 is made applicable in terms only to Title XXX, of which the Act of June 29, 1906, is not a part.

To hold that Section 2169 is a restriction on the Act of June 29, 1906, which provides for a "uniform rule for the naturalization of aliens," requires not only the inference of a prohibition of the naturalization of other than

free white persons and those of African nativity or descent from words which contain no such prohibition, but also making a section which declares that *"the provisions of this Title shall apply"* to a restricted class of aliens, declare that the *provisions of the Act of June 29, 1906,* shall apply only to the same restricted class of aliens; not only converts that which is in terms an extension of the meaning of the Act into a restriction, but also incorporates into a general law, purporting to contain the entire uniform rule for naturalization, a provision which is in, and restricted in terms to, a title in another Act, which Act and which title have not been repealed. The more reasonable supposition is that Congress intended to retain Section 2169 as a limitation on the specially excepted classes provided for in the unrepealed sections in Title XXX, and that the general rule provided for in the Act of June 29, 1906, applied to all other aliens and was not to be restricted, excepting as provided in that Act. These conclusions, drawn from the general scope of the Act, are reinforced by the express language of the Act of June 29, 1906, which declares, in the terms used in the previous general Acts, omitting the words "being a free white person."

> "Sec. 4. That an alien may be admitted to become a citizen of the United States in the following manner and *not otherwise.*"

and then prescribes *all* the conditions of admission and provides for a petition setting forth *"every fact material to his naturalization and required to be proved,"* this form given for the petition containing no fact to show that the applicant is a free white person or that he is of African nativity or African descent.

(d) The origin of the Uniform Act of June 29, 1906, shows that it was intended to be a complete scheme for naturalization, the test being "Fitness for citizenship" with no discrimination against Japanese.

The initiatory step in the legislation was an executive order issued in March, 1905, appointing a Commission composed of an officer from the Department of State, Gaillard Hunt, from that of Justice, M. D. Purdy, and from Commerce and Labor, Richard K. Campbell, who submitted a report transmitted to the 59th Congress by President Roosevelt, who, in his annual message at the opening of the session, December 5, 1905, announced the appointment and referred to this Commission and called attention to the recommendation "as to the importance of revising by appropriate legislation our system of naturalizing aliens" (Congressional Record, vol. 40, part 1, p. 99). The same message also dealth with the subject of immigration, the President saying:

> "The prime need is to keep out all immigrants who will not make good American citizens."

and again:

> "In dealing with this question it is unwise to depart from the old American tradition and to discriminate for or against any man who desires to come here and become a citizen, save on the ground of that man's *fitness for citizenship.* It is our right and duty to consider his moral and social quality. His standard of living should be such that he will not, by pressure of competition, lower the standard of living of our own wage-workers; for it must ever be a prime object of our legislation to keep high their standard of living. If the man who seeks to come here is from the moral and social standpoint of such a character as to bid fair to add value to the community he should be heartily welcomed. We can not afford to pay heed to whether he is of one creed or another, of one nation

or another. We can not afford to consider whether he is Catholic or Protestant, Jew or Gentile; whether he is Englishman or Irishman, Frenchman or German, *Japanese*, Italian, Scandinavian, Slav, or Magyar. What we should desire to find out is the individual man. In my judgment, with this end in view, we shall have to prepare through our own agents a far more rigid inspection in the countries from which the immigrants come. It will be a great deal better to have fewer immigrants, but all of the right kind, than a great number of immigrants, many of whom are necessarily of the wrong kind. As far as possible we wish to limit the immigration to this country to persons who propose to become citizens of this country, and we can well afford to insist upon adequate scrutiny of the character of those who are thus proposed for future citizenship" (p. 101).

and again:

"The questions arising in connection with Chinese immigration stand by themselves" (p. 101).

It will be observed that in this message, while the subject of Chinese immigration is dealt with at length and is said to stand by itself, it is expressly declared that there should be no restriction on *Japanese* immigration and that immigration should be limited as far as possible to future citizens, and the immigration restricted and scrutinized, with this requirement in view. In the proceedings in Congress there is no indication that Japanese were to be discriminated against either as to immigration or citizenship.

(e) This policy announced by President Roosevelt has been steadily followed in legislation in respect both to naturalization and immigration including the Act of 1917.

These Acts show that the policy of Congress is to exclude undesirable citizens and the Chinese and that

Congress has refrained with great care from any action tending to place Japanese in the same class with Chinese.

(1) *These Acts show the traditional policy of the United States to welcome aliens, modified only by restrictions against contract laborers, those morally, mentally and physically unfit for citizenship and the Chinese, but with no restrictions against the Japanese race.*

Immigration precedes naturalization in natural and logical order. The same reasons which tend to restrict one operate on the other.

Up to the adoption of the Revised Statutes, by treaties and statutes, the immigration of aliens had been encouraged; the alien Act of June 25, 1798, the one exception, was largely instrumental in sweeping the Federals from office and bringing in the Republican administration of Jefferson. That Act "has ever since been the subject of universal condemnation" (Mr. Justice FIELD in *Fong Yue Ting* v. *United States*, 149 U. S., 868).

Since the Revised Laws, various Acts have limited immigration, culminating in the Act of February 5, 1917. The earliest, that of March 3, 1875 (18 Stat. L., p. 477), is a limitation on the importation of women for immoral purposes, the supplying of coolie labor, and the entrance of alien persons under sentence for felonious crimes other than political.

By Act of August 3, 1882 (22 Stat. L., p. 214), convicts, lunatics, idiots or persons unable to take care of themselves were forbidden admission.

By Act of February 26, 1885 (23 Stat. L., p. 332), amended February 23, 1887 (24 Stat. L., p. 414), Congress reversed the policy of the United States, initiated by President Lincoln during the war, and prohibited the introduction of contract labor.

By Act of March 3, 1891 (26 Stat. L., p. 1084), there were added to the prohibited classes, paupers, persons suffering from a loathsome or dangerous contagious

disease, and persons who had been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and also assisted immigrants.

By Act of March 3, 1903 (32 Stat. L., p. 1213), there were added epileptics, persons who had been insane within five years or who had had two or more attacks, professional beggars, anarchists, prostitutes, procurers, and those previously deported.

A comparison with the requirements in the Act of June 29, 1906, shows that Congress excluded from naturalization the same classes denied admission under the immigration law, with the exception of those suffering from physical infirmities, requirements against physical infirmities acquired in this country not being applicable to naturalization.

An examination of the laws in regard to race exclusion shows that numerous Chinese exclusion Acts have been passed: May 6, 1882 (22 Stat. L., p. 58), July 5, 1884 (23 Stat. L., p. 115), October 1, 1888 (25 Stat. L., p. 504), September 13, 1888 (25 Stat. L., p. 476), May 5, 1892 (27 Stat. L., p. 25), November 3, 1893 (28 Stat. L., p. 7), June 6, 1900 (31 Stat. L., p. 588), March 3, 1901 (31 Stat. L., p. 1093), April 29, 1902 (32 Stat. L., p. 176), and April 27, 1904 (33 Stat. L., p. 394). The two latter Acts extend exclusion to the island territory under the jurisdiction of the United States, but do not forbid the passage from one island to another, and provide for Chinese laborers, other than citizens, obtaining a certificate elsewhere than in Hawaii. In none of these laws is there any reference to any other nationality than Chinese. To these can be added the Acts of April 28, 1904 (33 Stat. L., 478), and June 23, 1913 (38 Stat. L., 4.).

In Hawaii, by the joint resolution of July 7, 1898 (30 Stat. L., p. 751), further immigration of Chinese into the Hawaiian Islands was prohibited, and no Chinese was allowed to enter the United States from the Hawaiian Islands; and by the Organic Act of April 30, 1900 (31

Stat. L., p. 141), the Chinese were required to procure certificates under the Act of May 5, 1892.

The Act of March 3, 1891, committed to the Commissioner General the enforcement of the Chinese exclusion Act, while the Act of March 3, 1893, provided that it should not apply to Chinese persons, and the 36th section of the Act of March 3, 1903, contains this provision:

> "Provided, That this Act shall not be construed to repeal, alter, or amend existing laws relating to the immigration, or exclusion of Chinese persons or persons of Chinese descent."

Inserted in order to preserve those laws from repeal (24 Op. Atty.-Gen. 706).

> "The existence of the earlier laws only indicates the special solicitude of the government to limit the entrance of Chinese."
>
> *United States* v. *Wong You*, 223 U. S., 67;
> *In re Dow*, 213 Fed., 355.

Against this long line of statutes we place the fact that there is no line in any statute before or since 1875 which indicates any intention on the part of Congress to put the Japanese into the class with immoral, insane and other undesirable immigrants, or to class the Japanese with the Chinese or to discriminate against the Japanese in any way. We have traced the course of legislation along these two parallel lines and endeavored to show that the legislative mind ran in the same course, with no trace of intention to exclude the Japanese from admission or from naturalization.

The apparent exception in the Acts forbidding the importation of coolies (R. S., Secs. 2158 to 2163), originally enacted February 19, 1862 (12 Stat. L., 340), and the Supplemental Act of March 3, 1875 (18 Stat. L., 477), are but a prelude to the contract labor legislation beginning with the statute of February 26, 1885, and now found

in the general Immigration Act of February 24, 1907 (34 Stat. L., 898), making it a misdemeanor to import contract labor, which covers the ground of all the earlier Acts.

This court in a recent case, in reviewing the history of the immigration Acts, has held that the purpose of applying these prohibitions against the admission of aliens is to exclude classes (with the possible exception of contract laborers) who are undesirable as members of the community, even if previously domiciled in the United States.

Lapina v. *Williams*, 232 U. S., 78.

"That congress has never contemplated or intended to confer the right of naturalization upon Mongolians, *or natives of China*, is palpable by a mere reference to the laws upon the subject of naturalization. Section 2169 of the Revised Statutes, under the title 'Naturalization,' reads:

" 'The provisions of this title shall apply to aliens (being free white persons, and to aliens) of African nativity, and to persons of African descent.'

"Mongolians, *or persons belonging to the Chinese race*, are not included in this act. This was the view held by Judge SAWYER, sitting on the circuit bench for this circuit (Ninth), *In re Ah Yup*, 5 Sawy. 155, Fed. Cas. No. 104, where the subject was very learnedly and elaborately discussed and considered. He says, in summing up his conclusions:

" 'Thus, whatever latitudinarian construction might otherwise have been given to the term "white person," it is entirely clear that congress intended, by this legislation, to exclude Mongolians from the right of naturalization. I am therefore of the opinion that a native of China, of the Mongolian race, is not a white person, within the meaning of the act of Congress.' "

"But if there could be any question as to the meaning of the provision above referred to with

reference to Mongolians, the matter is settled and concluded by the imperative and unmistakable language of the act of congress of May 6, 1882, which says:

"'Hereafter no state court or court of the United States shall admit Chinese to citizenship.'

"That such is the law of the land and the policy of this country is explicitly recognized by article 4 of the convention between the United States of America and the empire of China, which was duly signed and ratified, and, on December 8, 1894, proclaimed by the president. This article provides:

"'In pursuance of article 3 of the immigration treaty between the United States and China, signed at Peking on the 17th day of November, 1880 (the 15th day of the tenth month of Kwanghsii, sixth year), it is hereby understood and agreed that Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States, shall have, for the protection of their persons and property, all rights that are given by the laws of the United States to citizens of the most favored nation, *excepting the right to become naturalized citizens* * * * '"

In re Gee Hop, 71 Fed., 274-275.

(2) *The immigration Act of February 5, 1917, and the circumstances of its passage in Congress show the clear intention of that body to make no declaration that Japanese are excluded from naturalization.*

The immigration Act of February 5, 1917, and the discussion of the bill in Congress show no intention of placing the Japanese in a class with the Chinese. Japan is expressly excepted from its provision by a territorial limitation, done in deference to the Japanese Government. (See correspondence between Senator Phelan and Secretary of Labor Wilson, Congressional Record, December 13, 1916, p. 266). As it came from the House, that bill, while making some small changes in excluded persons, particularly those afflicted with tuberculosis,

was chiefly marked by two additional grounds of exclusion: one, the provision for which three presidents of the United States had vetoed similar Acts,—the requirement that aliens over sixteen years of age, physically capable of reading, unable to read the English language or some other language or dialect, should be excluded, which finally became the law over the veto of President Wilson; the other, the inclusion in the excluded classes of:

> "Hindus and *persons who can not become eligible, under existing law, to become citizens of the United States by naturalization*, unless otherwise provided for by existing agreements as to passports, or by existing treaties, conventions, or agreements or by treaties, conventions, or agreements that may hereafter be entered into" (Congressional Record, p. 164).

To this clause the Japanese Government objected, and the State Department requested the bill to be amended (Congressional Record, Dec. 11, 1916, p. 165; and p. 235, Senator Lodge), and the bill was amended as follows:

> " * * * unless otherwise provided for by existing treaties, persons who are natives of islands not possessed by the United States adjacent to the Continent of Asia, situate south of the twentieth parallel latitude north, west of the one hundred and sixtieth meridian of longitude east from Greenwich, and north of the tenth parallel of latitude south, or who are natives of any country, province, or dependency situate on the Continent of Asia west of the one hundred and tenth meridian of longitude east from Greenwich and east of the fiftieth meridian of longitude east from Greenwich and south of the fiftieth parallel of latitude north, except that portion of said territory situate between the fiftieth and the sixty-fourth meridians of longitude east from Greenwich and the twenty-fourth and thirty-eighth parallels of latitude north, and no alien now in any way excluded from, or prevented from entering, the United States shall be admitted to the United States." [Sec. 3.]

Numerous amendments were offered to this clause. The southern senators endeavored to exclude immigration of Negroes, particularly from the West Indies; the members from the Pacific coast to exclude the Orientals. All amendments were voted down, the west not voting with the south on the Negro, and the south not voting with the west on the Asiatic.

There are frequent tributes in the debate to the Japanese nation; among others that Japan has control of the Pacific Ocean, is a great naval and military power. (Senator Gallinger, p. 285.)

> "As a matter of fact, I believe that Japan is one of the most efficient as well as one of the most powerful of nations. I recognize her great intelligence, I recognize her great efficiency in whatever walk of industrial life they seek to enter." (Senator Chamberlain, p. 226.)
>
> "I have never claimed, neither do the people of the Pacific coast claim, that the Japanese are an inferior race." (Senator Works, p. 228.)
>
> "The Japanese feel that they are equal; in fact, they feel that they are our superiors, and in many respects they are. They are able, fit, thrifty, and shrewd." (Senator Lane, p. 231.)
>
> "There are some 14,000,000 negroes in the South. They are spreading themselves all over the United States. Everybody admits that they are an inferior race to the Japanese.
>
> "* * * The Senate has today and yesterday voted down half a dozen amendments to this bill to exclude negroes from immigration into the United States. Neither the Independent Senator from the State of California nor the Democratic Senator will dare to say that the Japanese are inferior to negroes, and yet we got no help. We asked for bread, and you gave us a stone. You are not willing to vote to exclude negro immigration from the West Indies.
>
> "You stand around and smile and risk international complications with Japan on a race issue

about the Japanese, who are as highly civilized as you are.

"* * *

"The Japanese are not a race of barbarians; they are not a race of veneered men; they are a race of people who have proven their ability to stand in the front ranks of civilization." (Senator Williams, pp. 388, 389.)

In the course of the debate, there are frequent statements that Japanese are ineligible to citizenship, but (pp. 234, 235) *Congress evidently did not know whether the Japanese were excluded or not.* Senator Lodge (p. 234) said:

> "The only change from that bill which was vetoed (by President Wilson) was the insertion of the word 'Hindus'—'Hindus and persons who can not become eligible under existing law.' The purpose of that was to exclude Asiatic immigration, Mongols having been held by the courts to be not eligible to naturalization."

but he goes on to say that this form of words was extremely offensive to Japan. Senator Norris pushed Senator Lodge with the question why Japan objected to the language; they were either included or not included, either eligible or not eligible; and Senator Phelan asked, apropos of an amendment (not appearing in the enacted law) in which "white persons" were added to the various status and occupations not excluded, what was meant by "white persons," saying that the Hindus claim, in naturalization proceedings, to be white persons of the Aryan race, to which Senator Lodge assented, saying:

> "Well, by the use of the expression 'white persons' you have no protection whatever under the naturalization law" (p. 234);
> "that is not defined" (p. 334).
>
> "Mr. Phelan. The Japanese claim that they are white persons; the Hindus claim that they are

white persons. It is a very dangerous proposition."

"Mr. Lodge. Yes; they claim it, but it has not been so held. *I think it is a danger involved in the naturalization law*, which is the foundation of the *whole thing*" (p. 234).

"Mr. Lodge. Nobody has ever claimed that Mongolians were of the white race."

"Mr. Phelan. The Japanese dispute that they are Mongolians."

"Mr. Lodge. They may do so, but it has never been held by our courts that they were white" (p. 235).

"Mr. Nelson. Would it not be more accurate, instead of saying 'white persons,' to say 'persons of the white race'? Would not that be more exact and more comprehensive, and is not the expression 'white persons' ambiguous?"

"Mr. Lodge. I think the expression 'white persons' is more explicit, because when that expression is used it becomes a pure question of color, and you lose the ethnic distinction entirely. I am not sure that the employment of the term 'white persons' might not get us into some difficulties elsewhere, but 'white race' is not a scientific definition at all. The difficulty lies in trying to accomplish what is sought to be accomplished without using names. We are trying to avoid that" (p. 235).

In the Conference Committee the phrase "white persons" was deleted. From this it appears that the Japanese Government and the State Department and Congress deleted the provision in reference to persons who are not eligible to naturalization lest it should be an implied recognition that the Japanese might not be eligible, and that Congress fully understood that under existing law it was the Mongolians who were intended to be excluded, and that the Japanese claim not to be Mongolians, but white persons within the existing law.

In this connection it is worth noting that among the

Acts which are not repealed, altered or amended by this Act are all Acts relating to the immigration or exclusion of Chinese, among which Acts is the Act of May 6, 1882, forbidding naturalization of Chinese.

(f) Any other construction would be violative of the existing treaty with Japan.

By the treaty with Japan of March 21, 1895 (29 Stat. L., p. 849),

> "the citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel, or reside in any part of the territories of the other contracting party, and shall enjoy full and perfect protection for their persons and property."

This treaty is still in force, but in April, 1911, a new treaty, dealing solely with commerce and navigation, was negotiated. *Each treaty contains the favored nation clause.*

Nothing could more clearly show the distinction made between Japanese and Chinese as to naturalization than that the *only limitation* on the rights of Japanese aliens in this country under the treaty of March 21, 1895, is the stipulation that the rights given

> "do not in any way affect the laws, ordinances and regulations with regard to trade, *the immigration of laborers,* police and public security which are in force or which may hereafter be enacted in either of the two countries."
>
> *Yamataya* v. *Fisher,* 189 U. S., 86.

while the Chinese treaty of December 8, 1894, provided that Chinese

> "either permanently or temporarily residing in the United States, shall have, for the protection of

> their persons and property, all rights that are given by the laws of the United States to citizens of the most favored nation, *excepting the right to become naturalized citizens.*"

(g) The Act of May 9, 1918, amending the uniform naturalization law of June 29, 1906, tends to support the view that Section 2169 is only restrictive of Title XXX of which it is a part.

The Act of May 9, 1918, does three things: it amends Section 4 of the Act of June 29, 1906, by adding seven new subdivisions numbered seven to thirteen; it repeals certain Acts so far as covered by these seven subdivisions; it validates all certificates of naturalization upon declarations of intention filed prior to September 27, 1906, and it incidently rectifies an error in the original Act in reference to the District of Columbia.

The first of these new subdivisions numbered "seventh" is a curiosity chiefly because of the anomalous allegiance of the Filipino and Porto Rican. It provides that the native-born Filipino of required age who has made his declaration of intention, after service of not less than three years in the Navy, Marine Corps or Naval Auxiliary Service and has an honorable discharge or discharge for re-enlistment may

> "on presentation of the required declaration of intention petition for naturalization without proof of the required five years' residence within the United States if upon examination by the representative of the Bureau of Naturalization, in accordance with the requirements of this subdivision, it is shown that such residence can not be established";

while "any alien, or any Porto Rican not a citizen of the United States" of the required age who has enlisted in *any* of the branches of the army or militia, Navy or

Marine Corps or Naval Auxiliary Service, or the Coast Guard, without restriction as to length of service provided that he has re-enlisted, been re-appointed, or has an honorable discharge or furlough to the Army Reserve or the Regular Army Reserve or has served three years on a vessel of the United States Government or a merchant or fishing vessel of more than twenty tons burden, may be so naturalized; while "any alien" serving in the military or naval service during the war may be naturalized without preliminary declaration or proof of residence; and any alien, who has served in the army or navy or *Philippine Constabulary,* been honorably discharged and entered military or naval service may be naturalized on three years' residence either in the United States, Philippine Islands or Panama Canal Zone, and petitions may be filed at the most convenient court either by an alien or a person owing permanent allegiance to the United States, who comes within the subdivision, and may be heard immediately; the alien but not the person owing allegiance may file his petition without personal appearance and without fee, but the poor Filipino, inhabitant of the Canal Zone or Porto Rican not a citizen, apparently has to appear in person and pay his fees. This section appears to make distinctions between the Filipino in the Naval and Marine Corps and the Army, and between the alien and the person owing allegiance to the United States, on lines which are not at all clear.

Sudivision "eight" re-enacts the Seaman Act; "ninth" provides for instruction in citizenship; "tenth" disposes of the declaration of intention in certain cases of misinformation; "eleventh" modifies the provision for the naturalization of alien enemies so that the declaration of intention must be made two years prior to the existence of the state of war and provides further security against fraud in the naturalization of alien enemies; "twelfth" for the resumption of citizenship by persons in the mili-

tary service of the allies; and "thirteenth" provides for service in the military or naval forces of the United States wherever they may be, to be construed as residence in the United States.

The repealing section is obscure. Section 2166 is repealed excepting as to aliens prior to January 1, 1900, serving in the armies and with a discharge, also Section 2174, a portion of the Naval Appropriation Act of July 26, 1894, the like Act of June 30, 1914, and a portion of Section 3 of the Act of June 25, 1910, are repealed; excepting for the purpose of prosecuting for offenses, and the Act continues:

> "That all Acts or parts of Acts inconsistent with or repugnant to the provisions of this Act are hereby repealed; but nothing in this Act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh subdivision of this Act and under the limitation therein defined."

There is no "seventh" subdivision of *this* Act unless it is that entitled "thirteenth" relating to continuous residents within the United States, but if the seventh subdivision of Section 4 of the Act of June 29, 1906, is referred to, there is nothing "specified" in that subdivision in reference to Section 2169 and there is no "limitation therein defined" of Section 2169, which is neither "repealed nor in any way enlarged" by that subdivision, or for that matter by any part of the Act itself, unless the contention made in this brief is to be sustained. If the effect of taking special cases of soldiers and sailors out of Title XXX and putting them into the Uniform Act of June 29, 1906, takes them out of the limitation of Section 2169, then, although that section is not repealed or for that matter enlarged, it no longer has any application, and in that sense the change is specified and the limitation defined.

II.

The point that Section 2169 enlarges and not restricts Title XXX of the Revised Laws, has never been adjudicated in any true sense, and the point that Section 2169 does not resrict the Uniform Act of June 29, 1906, but is confined by its terms to Title XXX, has never been adjudicated at all.

(a) No court excepting Judge Lowell, *in re Halladjian*, has taken into consideration what the section plainly says.

No judge and no court has ever analyzed this section in connection with Title XXX, excepting Judge FRANCIS C. LOWELL, who said:

> "Rev. St. 1873, Sections 2165-2168, omitted mention of 'free white persons,' thus opening naturalization to all aliens. Notwithstanding this universal inclusion, yet the special inclusion of Africans made by the act of 1870 was expressly, though needlessly, continued in section 2169, as follows:
>
> " 'The provisions of this title (Naturalization) shall apply to aliens of African nativity and to persons of African descent.'
>
> "The intent of Congress in passing section 2169 in its original form was to insure by express inclusion the right of Africans to be naturalized like all other persons. By Act February 18, 1875, c. 80, 18 Stat. 318, passed 'to correct errors and to supply omissions in the Revised Statutes,' section 2169 was amended to take its present form, thus again limiting naturalization to (1) free white persons, and (2) Africans within the act of 1870. The broad phrase 'any alien' was left unchanged in sections 2165-2168, and its meaning therein was defined and cut down by section 2169. This is the most reasonable construction of section 2169 in its

present form. To make the additional express inclusion of whites by the amendment of 1875 operate to exclude all other persons from naturalization is an awkward construction, but seems inevitable. By Act May 6, 1882, c. 126, Sec. 14, 22 Stat. 61, the courts were forbidden to naturalize Chinese."

In re Halladjian, 174 Fed., 834.

But this was not necessary to the decision, for the point decided in that case is that an Armenian is a white person.

As a matter of fact, the opinions, from that of Judge SAWYER down, are based on the debates in Congress and not on the language of the provision. In the debate in 1870 the Chinese alone were referred to, and at that time the words "being a free white person" in existing law were restrictive. The remarks of Mr. Poland in 1875 show Congress intended to give the old meaning to the clause.

Even the language of a member of the committee cannot be resorted to for the purpose of construing a statute contrary to its plain terms.

Pennsylvania R. Co. v. *International Coal Min Co.*, 230 U. S., 184.

And beyond the reports of the committee, this court will not go.

"The unreliability of such debates as a source from which to discover the meaning of the language employed in an act of Congress has been frequently pointed out."

Lapina v. *Williams, ubi supra.*

No court other than Judge LOWELL has ever considered the language of the section, has ever taken into consideration the fact that the amendment was not made

to Section 2165 where, if intended to be restrictive as in the earlier law, it belonged, but to 2169, which was originally and still continues to be a broadening and not a restricting clause, but all these decisions, as we have said, are based on a pure supposition of what Congress intended to do, based on remarks of Mr. Poland and the desire of the western coast to exclude Chinese, which California evidently did not consider was safely done until the passage of the Exclusion Act of 1882.

(b) No court has ever passed on the point that Section 2169 is confined in terms to Title XXX of the Revised Laws.

The only question which has been adjudicated is whether Section 2169 is repealed, and it has been held that as Section 2166 is not repealed and would be governed by Section 2169, the Act of 1894 being similar, it restricted that Act also.

Bessho v. *United States, ubi supra.*

United States v. *Balsaro, ubi supra,* is a little nearer in language, but in that case the order admitting a Parsee was affirmed, and what is said on the question of the implied repeal of Section 2169 is *obiter dictum.* The Act of June 29, 1906, is assumed to be a part of Title XXX of the Revised Statutes of the United States. The requirement that the petition should set forth all material facts is not referred to, and what is said about the statement as to color in the declaration of intention, overlooks the requirement that color is shown "as a visible distinctive mark" to identify the petitioner for naturalization, and is not required to be set forth in the petition as one of the material facts.

In re Alverto, 198 Fed., 688, a doubtful decision, merely cites *United States* v. *Balsaro,* as authority to the point.

Summing up these cases, the *Bessho* case decides nothing in regard to the Act of June 29, 1906. It deals with the limitation on the excepted classes, and the Act of July 26, 1894, which is said to be similar to Section 2166, which is not repealed, and, being a part of the title, would be controlled by Section 2169. What is said in the *Balsaro* case is *dictum* of the hasty and ill-considered sort; and THOMPSON, *District Judge,* in the *Alverto* case does not discuss the point, simply citing the *dictum* in the *Balsaro* case as decisive. In the *Alverto* case the petitioner relied on the Act of July 26, 1894, being the excepted classes, but also claimed under Section 30 of the Act of June 29, 1906.

III.

Section 2169, if applicable to the Act of June 29, 1906, must be construed as meant in the Act of March 26, 1790, and, so construed, "free white persons" means one not black, not a negro, which does not exclude Japanese.

(a) Section 2169, if considered as a re-enactment of the earlier law, is to be construed in the light of, and with the meaning of the original Act of March 26, 1790.

> "* * * upon a revision of statutes, a different interpretation is not to be given to them without some substantial change of phraseology—some change other than what may have been necessary to abbreviate the form of the law. Sedg. Stat. Const., 365."
>
> *McDonald* v. *Hovey,* 110 U. S., 619;
> *In the matter of Kang-Gi-Shun-Ca.,* 109 U. S., 556;
> *Crenshaw* v. *United States,* 134 U. S., 99.

> "The reenacted sections are to be given the same meaning they had in the original statute, unless a contrary intention is plainly manifested."
>
> *United States* v. *Le Bris*, 121 U. S., 278.

There must be something clearly showing an intention to change the law.

> *United States* v. *Ryder*, 110 U. S., 729.

The construction is with reference to the original Act.

> "This rule has been repeatedly applied in the construction of the Revised Statutes."
>
> *Hamilton* v. *Rathbone*, 175 U. S., 414.
>
> "The meaning of free white persons is to be such as would naturally have been given to it when used in the first naturalization Act of 1790."
>
> *Ex parte Shahid*, 205 Fed., 812.

(b) So construed, the words "free white persons" in the Act of March 26, 1790, mean free whites as distinct from blacks, whether slave or free.

At the time the original law was passed, which provided for the admission of "aliens being free white persons," there can be no question but white was used in counter distinction from black, and "free white persons" included all who were not black. The latter were chiefly slaves, regarded as an inferior race, and the Constitution, Article I, Section 9, provided that

> "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight."

which provision was universally understood to be aimed

at the abolition of the slave trade after that date. It was certainly not used in a scientific or technical sense.

Blumenbach's race classification, which has been cited by many as a basis for construing this Act, was published in Germany during the American Revolution in 1781. It was first translated into English in London in 1807 by Eliotson.

> *In re Dow,* 213 Fed., 355, 365;
> *Dow* v. *United States,* 226 Fed., 145.

It was only a few years before this, 1783, that Harvard had permitted those not preparing for the ministry to take French instead of Hebrew, and Charles Follen became the first instructor in German in any college at Harvard in 1825, and it is well known that it was not until much later than 1790 that there was any Germanic influence in American education. In fact, it was an almost unheard of thing that Bancroft, after his graduation in 1817, should go to Germany for further study. No college or university taught anthropology until after the middle of the nineteenth century. The first systematic instruction was at Harvard in 1888 and at Clark University in 1889. The various instrumentalities for anthropological research have grown up since 1875. (Americana Vol. 1, Anthropology.)

None of the Senators or Congressmen had any education which brought them into contact with Blumenbach's classification when this naturalization law was passed in 1790. In the course of a debate on the law in 1790 Madison, who was then in Congress, said:

> "They would induce the worthy of mankind to come, the object being to increase the wealth and strength of this country. Those who weaken it are not wanted." (Legislative History of Naturalization by Franklin, p. 40.)

In the same debate, Page of Virgina held that the European policy does not apply here, and that a more liberal system was permissible. It was inconsistent with the claim of Asylum to make hard terms. These would exclude the good and not the bad. He would welcome all kinds of immigrants; all would be good citizens. Lawrence of New York declared that they were seeking to encourage immigration. All comers, rich or poor, would add to the wealth and strength of the country. Those speaking on the other side urged the apprehension from introducing paupers or criminals, or those lacking in character, in knowledge of or attachment to free institutions, for instance, Roger Sherman, who thought the intention of the constitutional provision was to prevent States from forcing undesirable persons on other States, and that Congress would not compel the reception of immigrants likely to be chargeable to a State. (*Idem*, p. 38.)

President Jefferson, in his first message to Congress, December, 1801, said, in recommending the repeal of the alien Act of 1798, and the revision of the laws on the subject of naturalization:

> "Shall we refuse to the unhappy fugitives from distress that hospitality which the savage of the wilderness extended to our fathers arriving in this land? Shall oppressed humanity find no asylum on this globe?" (*Idem*, p. 97.)

Judge Lowell, in the most exhaustive discussion that has been had upon the meaning of this section, after showing that race "is not an easy working test of 'white' color as required by Section 2169," continues:

> "Section 2169, however, makes no mention of race or of racial discrimination. 'White persons' are to be naturalized and (except Africans) no others. If we pass from racial speculation and remote history to the usage of the colonies and of

the United States in statutes and in official documents, the interpretation of the word 'white' will be found less difficult. In this interpretation the statutes for taking the census and the actual classification employed therein are instructive. A census, dealing with all inhabitants (except untaxed Indians in some cases), cannot discriminate against any inhabitant by omission. The Massachusetts census of 1764 classified the inhabitants of the province as whites, negroes and mulattoes, Indians, and 'French neutrals.' The Rhode Island census of 1748 as whites, negroes, and Indians; that of 1774 as whites, blacks and Indians. The Connecticut census of 1756 classified the persons enumerated as whites, negroes, and Indians; that of 1774 as whites and blacks. The blacks were classified as negroes and Indians. The New York census of 1698 classified the persons enumerated as men, women, children, and negroes; that of 1723 as whites, negroes, and other slaves; those of 1731, 1737, 1746, 1749, 1756 and 1771 as white and black; that of 1786 as whites, slaves, and 'Indians who pay taxes.' The New Jersey census of 1726 classified the persons enumerated as whites and negroes; that of 1737-38 as whites, negroes, and other slaves. The Maryland census of 1755 classified the persons enumerated as whites and blacks. A Century of Population Growth in the United States, published by the Department of Commerce and Labor in 1909, chapter on White and Negro Population, and Enumerations of Population in North America prior to 1790. 'The population of the earliest English settlements in America,' so the chapter opens, 'was composed of two elements, white and negro. These two elements, though subject to entirely different conditions, continue to compose the population of the republic.' Page 80. Here, again, 'white' is made to include all persons not otherwise specified."

"The census act of 1790 (Act March 1, 1790, c. 2, 1 Stat., 101) provided for a census of all the inhabitants of the United States, except Indians not taxed. These inhabitants were to be classified by

'color,' and the schedule provided by the statute made a classification as free whites, other free persons, and slaves. It is evident from the government publication just quoted that the phrase 'other free persons' was construed to mean 'free negroes,' and this was substantially the classification made in the censuses taken in the first half of the nineteenth century. Act May 23, 1850, c. 11, 9 Stat., 428; 433, for the taking of the seventh and subsequent censuses, provided in the statutory schedule for a classification of free inhabitants by color as 'white, black, or mulatto.' In the census of 1860 the classification was 'white, free colored, and slaves,' and the class 'free colored' was subdivided between blacks and mulattoes. Rev. St., Sect. 2206, provided for census schedules classifying all inhabitants of the United States by color as 'white, black, or mulatto,' although there appears to have been special provision for the enumeration of Indians (Act March 1, 1889, c. 219, Sect. 9, 25 Stat., 763), and the enumeration was made accordingly. 'For the censuses from 1790 to 1850, inclusive, the population was classified as white, free negro, and slave only, while for the censuses from 1860 to 1890, inclusive, the population included, besides the white and negro elements, the few Chinese, Japanese, and civilized Indians reported at each of these censuses.' Eleventh Census, part I, p. XCIV. In fact, the classification was not uniform in all parts of the country. Census Act March 3, 1899, c. 419, Sect. 7, 30 Stat., 1014 (U. S. Comp. St. 1901, p. 1339), provided for a classification of inhabitants by 'color,' and appears to have left the preparation of schedules to the director of the census. The classification employed, in some instances at least, was as whites, negroes, Indians, Chinese, and Japanese. In other instances 'colored' as opposed to 'white' was used to include negroes, Chinese, Japanese, and Indians. Throughout the Chapter cited in the above-mentioned Bulletin, it is assumed that all persons not classified as white, in the first eight federal censuses at any rate, were negroes or Indians.

"This use of the word 'white,' which has been illustrated from the censuses, both colonial and federal, is further exemplified in modern statutes requiring separate accommodation in travel. A statute of Arkansas required separate accommodation for the 'white and African races,' and provides that all persons not visibly African 'shall be deemed to belong to the white race.' Acts 1891, p.17, c. 17, Sect. 4. See, also, Laws Fla. 1909, p. 39, c. 5893; Acts Va. 1902-1904 (Extra Sess.), p. 987, c. 609, sub. 4 (Code 1904, Sect. 1294d); Civ. Code S. C. 1902, Sect. 2158. Concerning the use of the word 'white' in treating of schools, see Civ. Code S. C. 1902, Sect., 1231; Ky. St. 1909 (Russell's), Sects. 5607, 5608, 5642, 5765 (Ky. St. 1909, Sects. 4523, 4524, 4428, 4487). The recent Constitution of Oklahoma (Article 23, Sect. 11) reads as follows:

" 'Whenever in this Constitution and laws of this state the words "colored" or "colored person," "negro," or "negro race" are used, the same shall be construed to mean to apply to all persons of African descent. The term "white race" shall include all other persons.'

"References like those made above could be multiplied indefinitely.

"From all these illustrations, which have been taken almost at random, it appears that the word 'white' has been used in colonial practice, in the federal statutes, and in the publications of the government to designate persons not otherwise classified. The census of 1900 makes this clear by its express mention of Africans, Indians, Chinese, and Japanese, leaving whites as a catch-all word to include everybody else. A similar use appears 130 years earlier from the provincial census of Massachusetts taken in 1768, where 'French neutrals' are not reckoned as white persons, notwithstanding their white complexion. Negroes have never been reckoned as whites; Indians but seldom. At one time Chinese and Japanese were deemed to be white, but are not usually so reckoned today. In passing the act of 1790 Congress did not concern

itself particularly with Armenians, Turks, Hindoos, or Chinese. Very few of them were in the country, or were coming to it, yet the census taken in that year shows that everybody but a negro or an Indian was classified as a white person. This was the practice of the federal courts. While an exhaustive search of the voluminous records of this court, sitting as a court of naturalization, has been impossible, yet some early instances have been found where not only western Asiatics, but even Chinese, were admitted to naturalization. After the majority of Americans had come to believe that great differences separated the Chinese, and later the Japanese, from other immigrants, these persons were no longer classified as white; but while the scope of its inclusion has thus been somewhat reduced, 'white' is still the catch-all word which includes all persons not otherwise classified."

In re Halladjian, ubi supra.

(c) "White person," as construed by the Supreme Court of the United States and by the State Courts, means a person without negro blood.

This was so held by the Supreme Court of the United States in construing Section 2154 of the Revised Statutes, and it was held

> "that Congress meant just what the language used conveys to the popular mind."
>
> *United States* v. *Perryman,* 100 U. S., 235.

namely, a person not a negro.

We shall give, in connection with citations from the dictionaries, a reference to the numerous States which have used the expression "white person" to distinguish a person who had no negro, or only a part negro, blood in his veins since the abolition of slavery. The earlier statutes in the States are reviewed by Chief Justice TANEY

in *Dred Scott* v. *Sandford*, and he shows, by an examination of these, the provision in the Articles of Confederation using the term "free inhabitants," to describe those who were "entitled to all the privileges and immunities of free citizens, in the several States," and the naturalization Act of March 26, 1790, that the expression "free white person" was used to exclude members of the inferior and degraded negro race, whether free or slaves. In discussing the first Militia Law, passed in 1792, he says:

> "The language of this law is equally plain and significant with the one just mentioned. It directs that every 'free able-bodied white male citizen' shall be enrolled in the militia. The word 'white' is evidently used to exclude the African race, and the word 'citizen' to exclude unnaturalized foreigners, the latter forming no part of the sovereignty; owing it no allegiance, and therefore under no obligation to defend it. The African race, however, born in the country, did owe allegiance to the government, whether they were slave or free; but it is repudiated, and rejected from the duties and obligations of citizenship in marked language."

Dred Scott v. *Sandford*, 19 How., 393, 420.

"White," as used in the legislation of the slave period, meant persons without a mixture of colored blood, whatever the complexion might be.

Du Val v. *Johnson*, 39 Ark., 182, 192.

(d) The primary definition of these words, as given by the great dictionaries, is one who is white, not black, nor a negro.

White is defined in the Standard Dictionary as

> "1. * * * opposed to *black*. * * *
>
> "2. Having a light complexion. (1) Of the color of the Eurafrican or Caucasian race: op-

posed especially to *negro*, but often to the yellow, brown, or red races of men."

The Century defines white as

"1. * * * The opposite of *black* or *dark*.

" * * *

"6. Square; honorable; reliable, as, a *white* man. (Slang, U. S.)"

Webster defines it as

"1. The opposite of *black* or *dark* * * *"

and defines a white person as

"a person of the Caucasian race (6 Fed., 256). In the times of slavery in the United States, *white person* is construed in effect as a person without admixture of colored blood."

"White person" is defined in the new Standard Dictionary as

"1. Any person of the Eurafrican race.

"2. (U. S.) Any person without admixture of negro or Indian blood. Since 1865 various legal constructions of this term have been made in different States, as in Arkansas, where a white person is one having no negro blood, or in Ohio, where one is a white person who has just less than half negro blood in his veins."

Webster's New International Dictionary.

"In various statutes and decisions in different States since 1865 *white person* is construed in effect as a person not having any negro blood (Arkansas and Oklahoma). A white person is one having less than one-eighth of negro blood (Alabama, Florida, Georgia, Indiana, Kentucky, Maryland, Minnesota, Montana, Tennessee, Texas, Maine, North Carolina and South Carolina). A white person is one having less than one-fourth of negro blood (Michi-

gan, Nebraska, Oregon and Virginia). A white person is one having less than one-half of negro blood (Ohio)."

(e) The insertion by Congress of the word "free" in Section 2169 in 1875, a word which had a definite meaning in 1790, but has no meaning if construed as a new enactment in 1875, shows the intention to re-enact the old section with the old meaning.

In 1790, as we have shown, "free" was inserted in the phrase "free white persons" to distinguish the class of aliens who could be naturalized from all negroes, whether slave or free. Again, at that time slavery existed in this country, and Congress had no power to forbid the slave trade, whether white or black. In 1875 there had been a complete change, not only in this country, but in the world. Slavery had been abolished in 1865 by the thirteenth amendment, and, as Dr. Francis Wharton used to say, before the Civil War freedom was sectional and slavery universal, whereas, after the war, freedom is universal and slavery sectional. If the word "free" refers to the condition of aliens in the United States, all aliens are free; if it refers to their condition in the country to which they owe allegiance, being domiciled in the United States, the land of the free, they have become free by the mere fact of coming into a free country.

IV.

Giving the words "free white persons" their common and popular acceptation in 1875, no "uniform rule" can be laid down, based on color, race or locality of origin, and there is nothing in the laws of the United States, its treaties, in the history of the time, or the proceedings of Congress, to show that Japanese were intended to be excluded.

(a) Up to 1875, there had been no Japanese immigration, no suggestion of their exclusion, and America had recently opened Japan to the western civilization, which Japan was gladly welcoming.

Up to 1875 few Japanese immigrants had entered America. In the decade of 1861-70, the immigration reports show that two hundred and eighteen arrived; in the next decade the number fell off. Exclusive of students, probably there were not fifty Japanese in the whole country. The Asiatic immigration was Chinese, largely imported to build the Pacific railroads, of an entirely different character from the present Japanese immigration, of single men who did not come to establish homes; the women imported as slaves for immoral purposes. It was a race which came chiefly as contract laborers, expecting to return; and these immigrants are termed indifferently in the debates and decisions Mongolians and Chinese.

(b) Judicial construction of the phrase up to 1875, does not sustain such an exclusion.

We have already cited the *Dred Scott* and *Arkansas* cases. There is little of judicial construction to be found. The Act was before the courts in New York and construed in an ably argued case, in which the Vice-Chancel-

lor, referring to President Madison's declaration in the debates in the Federal Convention in 1787 that America was indebted to emigration for its settlement and prosperity, showed that the policy was to encourage emigration, and "to bestow the right of citizenship freely, and with a liberality unknown to the old world."

Lynch v. *Clarke,* 1 Sandf., 583, 649, 661.

Amongst the state Acts discussed are two in which it appears that Virginia amended a statute of May, 1779, Chap. 55, which limited citizenship to *free white persons,* in 1792 to include *"all free persons"* (pp. 666, 667).

A decision by a divided California court, that the words in the 14th section of the California Act of April 16, 1850, providing that "No Black or Mulatto person, or Indian, shall be allowed to give evidence in favor of, or against a white man," included a Chinaman, holding that the term "Indian, from the time of Columbus to the present time, had been used to designate 'the whole of the Mongolian race,'"

> "that 'White' and 'Negro' are generic terms, and refer to two of the great types of mankind."
>
> "and that, even admitting the Indian of this continent is not of the Mongolian type, that the words 'black person,' in the 14th section, must be taken as contradistinguished from white, and necessarily excludes all races other than the Caucasian."
>
> *People* v. *Hall,* 4 Cal., 399, 404.

This decision does not seem to have been treated with much respect as a matter of reasoning; the legislature speedily amended the law, and the same court held that while *People* v. *Hall* must be followed,

> "we cannot presume that all persons having tawny skins and dark complexions are within the principle of that decision."

and allowed a Turk to testify on the ground that the Caucasian type predominated and constituted the controlling element.

People v. *Elyea*, 14 Cal., 145.

All that Chancellor Kent says is that he "presumes" that the phrase excludes the inhabitants of Africa and their descendants, and then he suggests that it *may* become a question to what *extent* persons of mixed blood are excluded, and what shades and degrees of mixture of color disqualify, and

> "Perhaps there *might* be difficulties also as to the copper-coloured natives of America, or the yellow or tawny races of the Asiatics, and it may well be *doubted* whether any of them are 'white persons' within the purview of the law."
>
> 2 Kent's Comm., p. 72.

(c) No "uniform rule," applicable in all cases, can be drawn from the decisions since 1875.

It has been held by this court that a Chinese person cannot become a naturalized citizen under the laws of the United States of May 6, 1882.

Low Wah Suey v. *Backus*, 225 U. S., 460.

A more accurate statement than the earlier one by Chief Justice FULLER, commented upon by Judge LOWELL,

> "That a native of China, of the Mongolian race, is not a white person within the meaning of the act of Congress."
>
> *In re Ah Yup, ubi supra.*

That "a person of Mongolian nativity" was a native of China and cannot become a citizen (*In re Hong Yen Chang*, 84 Cal., 163); that a Burmese, being a Malay, "who under modern ethnological subdivisions are Mongo-

lians," is not eligible (sic.) (*In re San C. Po,* 28 N. Y. Supp., 383); that it "includes members of the white or Caucasian race as distinct from the black, red, yellow and brown races" (*In re Alverto, ubi supra*); "The Caucasian race only" (*In re Akhay Kumar Mozumdar,* 237 Fed., 115).

> "Is the applicant from Europe and a member of the peoples inhabiting Europe, and there regarded as white, or a descendant of an emigrant from them?"
>
> *In re Dow,* 213 Fed., 355.
>
> "It would not mean Caucasian."
>
> *Ex parte Shahid, ubi supra.*

It would include persons on the European side of the Mediterranean, although racially descended from many sources, the generally received opinion being that they were white persons.

> *Dow* v. *United States,* 226 Fed., 145.

It would include a Parsee.

> *United States* v. *Balsara, ubi supra.*

It would not include a half white and half Indian, because not of the Caucasian race.

> *In re Camille, ubi supra.*

Speaking of the section, Judge LOWELL, from whom we have already quoted, sums up the whole matter:

> "That section implies a classification of some sort. What may be called for want of a better name the Caucasian-Mongolian classification is not now held to be valid by any considerable body of ethnologists. To make naturalization depend upon this classification is to make an important result depend upon the application of an abandoned scientific theory, a course of proceeding which surely

brings the law and its administration into disrepute. Here it is impossible to substitute a modern and accepted theory for one which has been abandoned. No modern theory has gained general acceptance. Hardly any one classifies any human race as white, and none can be applied upon section 2169 without making distinctions which Congress certainly did not intend to draw; *e. g.*, a distinction between the inhabitants of different parts of France. Thus classification by ethnological race is almost or quite impossible. On the other hand, to give the phrase 'white person' the meaning which it bore when the first naturalization act was passed, viz., any person not otherwise designated or classified, is to make naturalization depend upon the varying and conflicting classification of persons in the usage of successive generations and of different parts of a large country. The court greatly hopes that an amendment of the statutes will make quite clear the meaning of the word 'white' in Section 2169."

In re Mudarri, 176 Fed., 465 .

In cases dealing with Japanese, Judge COLT held *In re Saito*, 62 Fed., 126, that the Japanese were excluded because Congress refused to extend naturalization to the Mongolian race, and classes Chinese and Japanese on the same footing.

Judge HANFORD holds that Japanese are excluded because of

> "the intention of Congress to maintain a line of demarkation between races, and to extend the privilege of naturalization only to those of that race which is predominant in this country."

In re Buntaro Kumagai, 163 Fed., 922.

He does not say what race the Japanese belong to, nor what race is predominant.

In the *Bessho* case Judge GOFF would seem to exclude

Japanese because "all alien races except the Caucasian are excluded," and Judge CHATFIELD because

> "A person of the Mongolian race, either Chinese or Japanese, cannot be naturalized."
>
> *In re Knight*, 171 Fed., 299.

The Washington court would seem to exclude them because the naturalization law applied merely to the Caucasian race, and that it had been held *In re Saito* that a native of Japan was of the Mongolian race (*In re Yamashita*, 30 Wash., 234, 70 Pac., 482); the Utah court held that a Hawaiian, not being of the Caucasian or white race, or of the African race, was excluded. The court seemed to include the Hawaiians as *Mongolians!* (*In re Kanaka Nian*, 6 Utah, 259, 21 Pac., 993); Judge MAXEY admitted a copper-colored Mexican, who apparently was an Indian of unmixed blood, holding that Judge SAWYER's decision might well be limited to members of the Mongolian race, and while the applicant would not be, by any strict scientific classification, classed as white, he fell within the liberal intent of the statute, as shown by the course of the United States Government in annexation and treaty, citing *Lynch* v. *Clarke, ubi supra*, as to the liberal policy (*In re Rodriquez*, 81 Fed., 337). Judge MAXEY cites the Acts establishing territorial government for New Mexico and Utah, each of which use the expression "free white" to describe those entitled to vote, but which in the same section clearly recognize, as included in that definition, Mexicans who are not white or of the Caucasian race (p. 352).

The policy of the United States has been to include into its citizenship by annexation vast numbers of members of races not Caucasian, including many Mongolian. The annexation of Hawaii converted thousands of Japanese, not to mention other nationalities, into American citizens. The most recent is the Porto Rico Act, which

makes the Porto Ricans, who are as dark as the Japanese, American citizens.

The petitioner in the court below presented an incomplete list of fourteen naturalizations in various courts, and that court says it is understood that about fifty Japanese have been naturalized in State and Federal Courts.

In fact, the census of 1910 shows 209 American born citizens, 420 naturalized, and 389 with first papers, who are Japanese.

> American Democracy and Asiatic Citizenship (Gulick), p. 185.

(d) Such exclusion is inconsistent with friendship of America with Japan.

It is unnecessary to say anything upon the warm friendship of Japan toward America and America toward Japan from the time the hermit nation was opened up by Commodore Perry. Japan looked upon America as her friend and type until she was rudely awakened by the attitude of the United States Government during the Russo-Japanese war and events in California. The world war has contributed, however, to restore the relationship which existed unimpaired for half a century.

The feeling of the United States before the passage of the Act of 1906 is shown in the Annual Message of President Cleveland of 1894, who says (Message and Papers of the President, Vol. 9, p. 529):

> "Relations with this progressive nation should not be less broad and liberal than with other powers."

The announcement of what was really the admission of Japan to the family of nations by the treaties of 1899 in President McKinley's message of December 5, 1899, and the special message of President Roosevelt, December 18, 1905, confirm this.

The feeling of the Japanese towards America is nowhere better expressed than in the preface and the first chapter of Kawakami's remarkable book on "Japan in World Politics."

V.

The words "Free White Persons," neither in their common and popular meaning, nor in their scientific definition, define a race or races or prescribe a nativity or locus of origin. They deal with personalities and the qualities of personalities, and are only susceptible of meaning those persons fit for citizenship and of the kind admitted to citizenship by the policy of the United States.

(a) The words deal with individuals, not with races, nor with natives of any country or of any particular descent.

(b) The word "free" is an essential part of the clause. Under the old English law, it means a freeholder as distinguished from a serf. Under the Constitution, it is used in opposition to slave. It is a condition which the Declaration of Independence asserts all men are born to. It imports a freeman, a superior, as against an inferior class.

(c) "White" we have already sufficiently defined, and shown that the words "free white persons" had in 1875 acquired a signification in American statute law as expressing a superior class as against a lower class, or, to speak explicitly, a class called "white" as against a class called "black"; the white man against the negro.

(d) "Person" is "a living human being; a man, woman or child; an individual of the human race" (*U. S.* v.

Crook, 25 Fed. Cas., 695). The provisions of the 14th amendment in reference to persons "are universal in the application to all persons within the Territorial jurisdiction without regard to any difference of race, or color, or nationality" (*Y. Wo* v. *Hopkins*, 118 U. S., 369). The same rule has been applied to include aliens under the 5th and 6th amendments (*Wong Wing* v. *U. S.*, 163 U. S., 235).

(e) No case has considered this point or given emphasis in the construction of the section to the words "free" and "persons," which are as important to the construction as the word "white." Nearly all think the section deals with *races*.

VI.

The question certified is whether all Japanese as a people are excluded from naturalization which would exclude a "person" who is "free," who is "white," because he is a Japanese.

The question certified does not deal with individuals, but with a people, and the affirmative answer would exclude a Japanese who is "white" in color and is of the Caucasian type and race. No argument can accentuate this point more strongly than the mere statement of it.

VII.

The Japanese are "free." They are, or at least the dominant strains are "white persons," speaking an Aryan tongue and having Caucasian root stocks; a superior class, fit for citizenship.

> *"Of one blood hath He made all nations,"* says Paul; and from the time of Aristotle, science, as well as religion, has taught a common origin of mankind, and many of the great races today unite in common blood variations from one cause or another and centering in that common blood. Even Blumenbach, who is the father of modern anthropology, says that
>
> "Innumerable varieties of mankind run into one another by insensible degrees."

He invented the division into Caucasian, Mongolian, Ethiopian, American and Malay, of which the Britannica say, referring to the term Caucasian:

> "The ill-chosen name of Caucasian invented by Blumenbach * * * and applied by him to the so-called white races, is still current; it brings into one race peoples such as the Arabs and Swedes, although these are scarcely less different than the Americans and Malays, who are set down as two distinct races."
>
> 2 Enc. Brit., p. 113.

On the other hand, Cuvier divides the races into Caucasian, Mongol and Negro, corresponding to white, yellow and black, but this is clearly not sufficient.

Huxley distinguishes four principal types of mankind, the Australoid, Negroid, Mongoloid and Xanthochroic

("fair whites"), adding a fifth variety, the Melanochroic ("dark whites").

2 Enc. Brit., p. 113.

but that work adds, page 114,

> "The doctrine of the unity of mankind stands on a firmer base than in previous ages."

and Volume 9, Enc. Brit., p. 851, includes in the Caucasian race certain of the Brown Polynesian races, including Hawaiians and the Ainus.

In "Man, Past and Present," Professor A. H. Keane, F.R.G.S., in the "Cambridge Geographical Series," describes mankind under four leading types, which may be called black, yellow, red, and white, or Ethiopic, Mongolic, American and Caucasic. He distinguishes Mongolians into three kinds: Northern, Southern and Oceanic, extending from Finland to the Philippines, and reckons the Japanese among the Northern Mongolians, whose color is thus described:

> "Light or dirty yellowish amongst all true Mongols and Siberians; very variable (white, sallow, swarthy) in the transitional groups (Finns, Lapps, Maygars, Bulgars, Western Turks, and many Manchus and Koreans); *in Japan the uncovered parts of the body also white*" (p. 266).

The Encyclopaedia Britannica, Vol. 11, p. 635, commenting upon Professor Keane, says:

> "The contrast between the yellow and the white types has been softened by the remarkable development of the Japanese following the assimilation of western methods."

The decisive test which modern science has applied is cranial measurements, and it is this test which has excluded the Japanese from the Mongolian division, although Dr. Munro, hereafter quoted, referring to the fact that "Every human being is a mixture of root stocks," in a letter says:

> "It cannot be said that the Japanese are a Mongolian race, but Mendel's rule holds good and one may see pure Mongolian forms sometimes. I have seen a pure Mongolian type in the child of an American missionary (except the complexion and colour of the eyes) and this type is fairly common in East-central Europe.
>
> "The preservation of a conventional racial type is a matter of aesthetics. What really counts in humanity is home influence and education, and where the ideals are high, the racial type is of little moment. But as the prejudice exists and as each nation has the right to choose its physique, the best plan, as it seems to me, would be for the Japanese authorities to make some selection, from the anthropological point of view, of those going to the States. With regard to the present case, I shall be glad to help if I can, and would be glad to make an examination. The head form and facial indices would suffice."

It is common observation that the women of the Kyoto region in Japan, particularly the higher class, are white, not darker than many of the women of this country. The Ainu, an admitted Caucasian, is the darker. The influence of climate and habit has much to do with the matter of complexion. Ellis, in his Polynesian Researches, speaking of color, says that Polynesian infants are born little darker than European children.

Hawks' Narrative of Commodore Perry's Expedition to Japan, published by order of Congress in 1856, is the first authoritative and perhaps the only governmental expression on the origin of the Japanese. He says:

"Kaempfer brings them from the plains of Shinar, at the dispersion. He supposes them to have passed from Mesopotamia to the shores of the Caspian, thence through the valleys of the Yenishi, Silinga and parallel rivers to the lake of Argueen; then following the river of that name which arises from the lake, he thinks they reached the Amoor, following the valley of which they would find themselves in the then uninhabited peninsula of Korea, on the eastern shores of Asia. The passage thence to Japan, especially in the summer season, would not be difficult. He supposes that this migration occupied a long time. * * * This, if not satisfying, is at least ingenious. * * * Dr. Pickering, of the United States exploring expedition, seems disposed, from an observation of some Japanese whom he encountered at the Hawaiian Islands, to assign to them a Malay origin."

and speaking of their alleged Tartar origin, continues:

"But they certainly do not have the Tartar complexion or physiognomy. The common people, according to Thunberg, are of a yellowish color all over, sometimes bordering on brown and sometimes on white."

He also quotes the latter authorities as saying:

"That ladies of distinction, who seldom go out into the open air without being covered, are perfectly white. Siebold also, speaking of the inhabitants of Kiusiu, informs us that, 'the women who protect themselves from the influence of the atmosphere have generally a fine and white skin, and the cheeks of the young girls display a blooming carnation.'"

"In general the Japanese are of lighter color than other Eastern Asiatics, not rarely showing the transparent pink tint which white assume as their own privilege." (Ratzel's History of Mankind, Vol. 3, p. 454.)

Ratzel, after referring to the fact that the lower classes are darker, says:

> "Japanese, however, sees the ideal of his breed in fair skin, dark sleek hair and slender figure."

He quotes a story from Broca to show the similarity in appearance between the Brazilian and the Japanese.

Woodruff, in his "Effect of Tropical Life on the White Race," is struck by the fact that Japan is a counterpart of Great Britain, and Dr. Brown, from whom we will quote, has emphasized this in enforcing his view that the dominant races of man are maritime and that to make a great maritime people requires a high proportion of broken coast line to the area of the country, and preferably islands running north and south with a variety of climate.

Other authorities have sought to account for the mental alertness of the Japanese, a quality of mind in which they differ from other Asiatics and resemble the Europeans and the inhabitants of North America above the Mexican line. The Japanese are commonly called "The Yankees of the Orient," and they show no marks of the degeneracy common in the mixture of non-assimilable races. Doctor Baelz of the Imperial University of Tokyo is quoted by Kawakami in "Japan in World Politics," p. 112, upon this point, which has been with him a subject of research.

The history of the people who inhabit the islands of the Pacific has not yet been written, and even the standard authorities fail us as to their origin and affinities. The most reliable authority on Polynesia is Dr. J. Macmillan Brown, Vice Chancellor of the University of New Zealand, and on Japan, Dr. N. Gordon Munro, and a better understanding of these peoples can be had from their recent work than from any other source.

Some conclusions are now fairly well demonstrated: that the Polynesians are a Caucasian race speaking an

Aryan tongue, springing from the earlier Mediterranean race and allied to the later Baltic peoples of Europe; that a great nation once inhabited a continent now submerged in northwestern Polynesia, of which the capital was Ponape, in the Carolines—the stone remains showing an ancient city of 100,000 inhabitants, perhaps the fabled Hawaiki of the Polynesians; that the root stocks of the Japanese people are the Ainu in the north and the Yamato in the south, each Caucasian, the latter of the Mediterranean stock; that there was probably a palaeolithic as well as a megolithic invasion of Polynesia from Japan; that affinity is shown by the linguistic attitude of the Polynesian people which faces towards Japan; in the patriachate or headship of the father as against the matriachate; in its vocabulary and phrenology; again, from the location of the Polynesian spirit land or Hawaiki, for as the soldiers today at the Western front speak of the dead as "going West," so the souls of the departed Polynesians were said to have "gone West"; and finally by the maritime character of these people, for the Mongolian is primarily a landlubber, while the Japanese and the Polynesian are daring lovers of the seas.

Dr. Brown, in a paper delivered before the Hawaiian Historical Society, September 5, 1918, says that,

> "The phonology of the Polynesian dialects differs by the whole world from that of all the languages to the west of it * * * There are only two languages in the Pacific Ocean which have the same phonological laws, the Japanese to the northwest and the Quichua to the southeast * * * The range of sounds in Japanese is nearly the same as in Polynesian."
>
> "In fact, as Fornander points out, the primitive Aryan language must have had exactly the same range of consonants as Polynesian, and though the process was not carried so widely among the vowels, the decadence and interchange of consonants had begun. The homeland of the primeval Aryan

> is now accepted as in Europe between the Baltic and the Black Sea, and that was a cold region in which the organs of speech were capable of difficult consonantal sounds; whilst the environment of Polynesian after it reached the Pacific was tropical and exactly suited to the decay of the consonants."

and again:

> "The primeval Aryan languages must have traveled from Europe west of the line between the Baltic and the Black Sea through Asia, long before Sanskrit began its long migration into India or even began its elaborate inflectional system."
>
> "The linguistic attitude of Polynesia faces north towards Japanese and Ainu, which have got no such restriction on their use of nouns and numerals. That the Polynesian vocabulary looks also to some extent in that direction will be apparent from a few examples."

In his "Maori and Polynesian," Dr. Brown, in addition to proving that the Polynesians spoke an Aryan tongue and were of the Caucasian race, springing originally from the north of Africa, on the shores of the Mediterranean, thence migrating to the Baltic, and through southern Siberia, Lake Baikal, Korea and Japan, the megalithic track continued into Polynesia by a course involving much less sea than in the present age, when a large portion of Polynesian continent has subsided (pp. 3-5, 26, 27, 38, 59, 118, 252 and 253), points out the resemblance to the Japanese in maritime skill and love of the sea (p. 7), which is essentially Caucasian and not a trait of the Negroes or Negroids, Mongols or Mongoloids, that the route through Japan and Polynesia is the dolmen route, that the Japanese and Polynesians show affinities in art, in sports and in other habits of life (pp. 49, 50, 201 and 265), and that Polynesia affiliates with Japan in the patriarchate or father-headship as against the matriarchate or mother-right (pp. 38 and 250).

Dr. Munro, with Dr. Baelz's work as a basis, and much new material on which to base his conclusions, including the work of Gowland, Tsuboi, Baron Kanda, Aston, Torii, Takahashi and Wada, in a paper before the Asiatic Society of Japan, at Keio University, March 21, 1917, dealing with the two root people, the Ainu and the Yamato, particularly with the Yamato, says:

> "In respect to the personal investigation I have some justification in the knowledge that the demonstration of Ainu culture in the shellmounds of Honshu and Kyushu and of Yamato remains in shellmounds and stone age sites of the South is pioneer work, far from complete, but establishing the Ainu as aborigines and the Yamato root-folk as having also a birthright, if not as the prior autochthones of Japan * * *"

He then goes on to say:

> "* * * at the risk of again overcrowding material I shall first show some representative pictures of material preserved in and by association with the sepulchres of the Yamato and shall follow this with illustrations of these sepulchres themselves. I shall then present some evidence of similar sepulchres and of magalithic monuments in Europe with a rough sketch map showing their prevalence in the Mediterranean area and through the Eurasiatic continent. * * *"

finding the immediate source of this culture in

> "Korea, the proximate habitat of the Yamato invasion and immigration. From thence in all probability, came the virile forces of the iron wielding 'horseback domination' which ultimately united with the agricultural pre-Yamato folk of Kyushu and possibly around the Inland Sea."

where he thinks these people may have lived for a considerable time before invading Japan.

After referring to prototypes in Europe, in Egypt, in Greece and around the Mediterranean generally, he says:

> "We must, however, leave such parallels in culture and I can steal only one minute from our remaining time to point out the course of the ancient Japanese concept the *Mitsudomoe,* which is here shown and which from these examples may be traced into China and thence into Babylonian culture and that of the Mediterranean prehistoric civilization, where it is found on the spindle weights of Troy. It was also familiar as the anthropomorphic concept in the sun in almost every land (Egypt perhaps excepted) conventialised from the biped concept as a sign of mankind."

and after describing the sepulchres themselves, and discussing whether there was any contact with China, he concludes:

> "But it is not necessary to suppose that this 'Horse-back domination' ever came into close contact with the Chinese before settling in Korea.
>
> "Where then did the dolmen originate? That is likewise uncertain. But we know where dolmens existed at a date long anterior to those in Japan. That was in North Africa and in Europe, where dolmens contain relics of the later stone age and the early metal phases of copper and bronze, but rarely the least trace of iron. In Japan, on the other hand, the dolmens are of the iron age, with vestiges of the bronze period and mere traces of a stone age in conventional offerings."

and says there is something maritime in the character of the people of allied culture, and tracing this course he continues:

> "This culture did not spread into Egypt, though there are two patches on the Nile, but it is found in Syria and Palestine round the Black Sea and between it and the Caspian, in the Caucasus and southern Russia whence it spread into Siberia in a mitigated form. It also entered Arabia, Mada-

> gascar and Persia, while in southern and central southern India it was established on an immense scale. Whether it reached India by sea or land is not yet certain, but traces at least are known in northern India and it has been followed into Burmah."

after which he still further concludes that it is maritime, referring incidentally to the remains before referred to on the Island of Ponape, described by Christian in his book on the Carolines, and says:

> "* * * if we note the similarity of special designs and contrivances between East and West in prehistoric times, we have, I think, good ground for the belief that the dolmen culture of Japan was rooted in the Mediterranean area. It is a far cry from Japan to this area or to the region of the five seas, and it may be premature yet to insist on any limited area for the provenance of the Caucasian element in the Japanese people.
>
> "Whether there was any connection between the Yamato root-folk in Kyushu and the infiltration of European stock into the Pacific which resulted in the so-called Polynesian race, is another problem which is not yet ripe for solution. Any such connection must have been at a very remote age."
>
> * * *

and in conclusion says:

> "My opinion is that the Yamato root-folk of Kyushu and the present Polynesian people diverged from an Indonesian or other stock of European affinities in the very early stage of the neolithic or polished stone age, possibly in later palaeolithic times.
>
> "The Korean contribution to the Yamato probably came not only from the southern coast of Asia and the islands near to it, but also through Manchuria, possibly migrating in part from the Caspian sea, and keeping north of the fortieth parallel. Otherwise it seems to me that this migration through Asia must have occurred before the Chi-

nese civilization had concentrated south of that latitude. I do not doubt that some Mongolian element had penetrated the islands to the south of Japan in ancient times; indeed, I have evidence of it. But I think this element was inconsiderable and that we must look to the soldiery and the agricultural serfs in the Korean immigration for the Mongolian component persisting in Japan. That this ingredient is present admits of no question, but that is a very different thing from the assertion that the Japanese are a Mongolian race. I affirm that the Japanese are not predominantly Mongolian. Physical anthropology teaches us that the Japanese, as we ourselves, are a mixture, a conglomeration of characters of primitive as well as of advanced mankind. If I have been at all successful in demonstrating this in my first lecture; if we have come to the conclusion that the Ainu are, if themselves mixed with other characters, an early European stock, that they have mingled to some extent with the Yamato stock, considerably in the South and noticeably in the North; if the considerations which I have just brought forward with regard to the European provenance of Yamato culture have any validity in conjunction with the decided evidence of European traits in the physique of the modern Japanese, we cannot resist the conclusion that the word Mongolian is not a fit designation for the people of this land."

Little need be added to the tributes in the Senate of the United States, which we have quoted from the debate on the Immigration Act of 1917, but a summary of the history of the Japanese people during the last five or six hundred years by George Kennan, the distinguished traveler, which we take from The Outlook of June 27, 1914, is in point:

"At the beginning of the seventeenth century the Japanese were the most daring and adventurous navigators in all the Far East. Their insular position made them hardy and expert sailors, and

they had at sea a natural intrepidity which was almost equal to that of the Northmen. At the very dawn of authentic history their ships were cruising along the coasts of China and Korea, and as early as the sixth century an armed Japanese flotilla sailed northward to what is now Siberia and ascended the Amur River for the purpose of invading Manchuria. * * *

"Toward the close of the fifteenth century Japanese merchants began to extend their foreign trade to countries not previously visited, and as early as 1541 they had established commercial relations with more than twenty oversea markets, and were sending their ships to regions as remote as Java, the Malay Peninsula, Siam, and the western cost of India. In 1594, twenty-six years before our Pilgrim Fathers landed on the coast of Massachusetts, the Japanese had a regular line of merchant ships running to Luzon, Amoy, Macao, Annam, Tonquin, Cambodia, Malacca, and India, and making, without any great difficulty or danger, out-and-return voyages of from three thousand to twelve thousand miles. * * * They were quite capable of crossing the Pacific, and, as a matter of fact, two of them did go to Acapulco and back in 1610 and 1613. The sailors who manned these vessels were not as experienced as were the Spanish and Portuguese navigators of the same period, but what they lacked in experience they made up in enterprise, daring and resourcefulness. * * *

"All the Japanese of that time were imbued with an ardent spirit of daring and adventure, and long before the Mayflower sailed from Plymouth they had settlements, or colonies, in countries that are farther away from Japan than Massachusetts is from England. They took possession of the Luchu Islands, overran Formosa, helped the Spanish Governor of the Philippines to put down a revolt of the Chinese in Luzon, gained a strong foothold in Siam, and, fighting there in defense of the King, defeated invading forces of both Spaniards and Portuguese. Everywhere they were regarded as dangerous enemies, and in the library of Manila

there is still in existence a copy of a letter written by a Spanish friar to his home government in 1592, warning the authorities of Spain that the Japanese were 'a very formidable people,' and that their great Shogun, Toyotomi Hideyoshi, was likely to invade the Philippines as soon as he had finished the conquest of Korea. * * *

"There is a widespread popular belief that in the Middle Ages, and, indeed, long after the Middle Ages, the Japanese were an uncivilized if not a barbarous people; but this belief is based wholly on ignorance or misapprehension of their history and institutions. * * * As early as the seventh century the Japanese had schools, and before the beginning of the eighth they had established in Nara and Kyoto Imperial universities with affiliated colleges and courses of instruction in ethics, law, history, and mathematics. The oldest university in Europe, that of Salerno, Italy, was not founded until one hundred years later. The Japanese opened a great public library at Kanazawa in 1270, and established their first astronomical observatory more than a century before Commodore Perry entered Uraga Bay.

"Even in the field of material achievement, the mediaeval Japanese were pre-eminent. They would have regarded our invasion of Cuba with a force of 16,000 men as a very trivial affair. In 1592 their great leader, Hideyoshi, transported 200,000 men across the Tsushima Strait to Korea, and his first army corps, under General Konishi, marched 267 miles in nineteen days, fighting one pitched battle, storming two fortresses, and carrying two strong intrenched positions by assault. General Shafter was never more than eighteen miles from his sea base, while General Konishi, with Hideyoshi's first army corps, went 400 miles from his base at Fusan, and maintained intact through a hostile territory a line of communications. * * * "

In connection with the voyages to South America more than three hundred years ago, alluded to by Doctor Grif-

fis—and there are some indications that there was a line running to South America at that time—it is worth noting that the only line now running from the Orient to South America is Japanese, a fact commented on by Bingham in "The Monroe Doctrine," pp. 90-95, and in this connection Kawakami gives the Japanese in South America in 1910 as 21,878, of whom 15,462 are in Brazil and 5,428 in Peru.

VIII.

The Japanese Are Assimilable.

The debates in Congress and the literary controversies embodied in many books and articles on the Japanese question reduce the objection to Japanese naturalization to the claim that they are "non-assimilable" (Senator Phelan, p. 284; Senator Works, p. 228). This means that it is impossible for them and undesirable for us to have them adapt themselves to western ideas. This is a reversal of our traditional national policy, for it was President Fillmore who sent Commodore Perry to overturn the Japanese policy, which sought to prevent assimilation, and open up Japan to western civilization. The first article of the Perry treaty of 1854 declares:

> "There shall be a perfect, permanent, and universal peace and a sincere and cordial amity between the United States of America on the one part, and the Empire of Japan on the other, and between their people respectively, without exception of *persons* and *places*."

Having given Japan the bread of western civilization, shall the Japanese be forbidden to eat it? In view of the last sixty years, the charge is ridiculous. In what respect are they non-assimilable? Do they not have high ideals of honor, of duty, of patriotism, of family life, of religion and of social duty, and do they not adhere to

these better than we do? The dignity of manhood is held up by the Declaration of Independence as the highest ideal of Americanism. How about our treatment of the black man in the south, or the Oriental in the west? In art and literature, the criticism of the Japanese today is of the abandonment of their ideas, and too easy adaptation to western methods. In religion, Buddhism and Shintoism have been infused from some source so strongly with Christian ideals that their followers do not see the contrasting splendor of the Christian faith as strongly as awakened Korea does. Of course, they have a race prejudice, but nothing compared with that of the Jew, whom we gladly welcome and protect even in foreign lands, who sits in the halls of Congress, in our highest courts, amongst our executives, in the marts of trade. Naturally, a Japanese prefers to marry a Japanese, not only on account of race prejudice, but for other obvious reasons; but they do intermarry with whites, and the almost uniform testimony is that they have happy families and vigorous progeny, pre-eminently American. Section 2169 authorizes the naturalization of black men, but half the States forbid marriage between whites and blacks.

We would hardly require the Japanese to assimilate our manners, for their manners, particularly of the women, are far superior to our own. If, as seems true, the only argument against the fitness of the Japanese for naturalization is their non-assimilability, the argument is ended, for it is preposterous to claim that a nation which has shown itself to have the greatest capacity for adaptation, against whom the severest criticism is that they are imitators, is not capable of adapting itself to our civilization.

It cannot be said that the Japanese do not come to make a home, or that they have not that earth hunger which led our ancestors to cross the sea. The earth hunger of the Japanese and the wish to make a home is the objection of California. It cannot be said that he

lowers the standard of living. The "drastic investigation" authorized by the California legislature of 1909 found that the Japanese employed by white farmers were paid as much as white laborers, and that the Japanese paid more than the white man.

Race prejudice will always exist. It is innocuous in Hawaii, where the variety of race prejudices renders any dominant race prejudice impossible.

Finally, the change in the last fifty years in the habits, attitude towards the world, and the Constitution of Japan is a sufficient answer.

The story of the Japanese in Hawaii is significant. They are estimated to comprise 97,000 out of a population of 228,771, exclusive of the army and navy (Report of the Governor of Hawaii to the Secretary of the Interior, 1916, p. 4), or 42.5 per cent.

In business, the report shows that out of 1,780 independent houses of business in Honolulu the Japanese have 754; while in Hilo, out of 398, they have 248, or 1,002 out of 2,178, 46 per cent.—slightly higher than the proportion of population.

The Japanese have the lowest percentage of convictions of crime in proportion to population, namely, 2.39 per cent., excepting those classified in the Report as "whites" (including the Portuguese), who have 2.26 per cent. Excluding the Portuguese, the "whites" would have a higher percentage (p. 74); and the Japanese convictions are chiefly, like the Chinese, for gambling. Thus, the Japanese, although having 42.5 per cent. of the population, have but 13.31 per cent. of the prisoners, less than a third in proportion (p. 77). Of the delinquent and dependent boys and girls brought before the Juvenile Court, there were only 54 Japanese, or 9 per cent., whereas the proportion of population is 42.5 per cent. If convictions for gambling are eliminated (see report of the Chief Justice to the legislature), there are 1,794 convictions of "whites" (including Portuguese),

with an estimated population of 35,322, to 1,686 convictions of Japanese. In other words (gambling aside), there are three "white" convictions to one Japanese, in ratio to population.

Much has been said about the picture brides and divorces, but from the records of the Circuit Courts of Hawaii, in the same report of the Chief Justice, it appears that in 1916, 379 divorces were granted in the Territory, 193 of which were Japanese, but 8 per cent. larger than the percentage to population. This result should be surprising to one who is not familiar with the care which is bestowed on marriage by that method.

Mr. M. M. Scott, for thirty-five years the honored head of the High School in Honolulu and known to every student of the Japanese, and the recipient of especial recognition by the Japanese Government for his studies of the Japanese, says of their racial origin and assimilability, in a memorandum summing up what he has published at various times:

> "The Japanese people are classed as Mongolians by those who know absolutely nothing about physical anthropology. Those physical anthropologists that have studied bodily characters of the Japanese, all agree that they do not belong to the Mongolian race, whose main habitation is in Central Asia. Kaempfer, Titsignh, Von Rein, Morse and Bachelor, who were all skilled anthropologists, feel sure that whatever mixture there may be in their racial stock, Mongolian blood is not the predominant, nor even a large element in the Japanese. Not one of them would be rash enough to say what element of blood is the predominant one. The Japanese are a very mixed race, as any one may observe who travels from the extreme north to the extreme south of their elongated Empire.
>
> "I have been acquainted with the Japanese people for forty-five years. I was, by invitation of the Japanese Government, for ten years from 1871 in their service in establishing a system of

elementary schools throughout the country. In no one physical character do the Japanese people correspond to a like physical character of the true Mongolian. Neither in color of skin, nor pigment, nor stature, nor in measurement of limbs, above all, in 'cephalic index,' the surest character to determine race, can the Japanese be called Mongolians.

"First as to color of skin. In certain parts of Japan, regarded by their own ethnologists, the skin and pigment therein are more nearly white than yellow or brown. In the town of Sendai, in the north of the main island, the skin of the children and the women not in the fields would be taken by strangers, as belonging to the white race, rather than to any of the classified colored races. Likewise, in the typical Japanese city of Kyoto, those not exposed to the heat of the summer are particularly white-skinned. They are whiter than the average Italian, Spaniard or Portuguese.

"As before mentioned, the one character regarded by all anthropologists as the main one, is the 'cephalic index.' Now, the 'cephalic index' of the average Japanese corresponds more nearly with the Central European skull than it does with Chinese or Mongolian. The 'cephalic index' is from eighty to eighty-two, about the same as the great Germanic race. The modern anthropologist, Ratzal, regarded the world over as one of the most distinguished on this subject, agrees with the earlier writers mentioned in the foregoing part of this sketch. As to the possibility of assimilation to American standards of government and all other things American, I regard the Japanese as one of the most assimilable of all the races of man, or what is known in the United States as the 'New Immigration.' Truth to tell, since the Japanese have become a settled people, ethnically homogeneous, they have been assimilating everything they were shown from other nations. For a thousand years, with no intercommunication, except slight ingress and egress with China and Korea, they borrowed from China and Korea letters, literature and the art of porcelain making.

They have improved by their peculiar genius on everything they borrowed from these two places.

"Since the opening of Japan by Commodore Perry in 1854, treaties and communications with Western Nations have enabled the Japanese to assimilate science, industries, commerce, and politics with a rapidity that no other nation has ever shown. Their students are great admirers of American governmental forms, and even social forms. There is an immense body of men today in Japan urging a democratic and constitutional government on the model of that of the United States. There is no question but in a brief time their forms of government will be as liberal and democratic as those of England and the United States. They are immensely loyal—loyal to family and loyal to properly constituted government. Those Japanese born and nurtured in Hawaii are as much American as the children of the descendants of the Pilgrim Fathers that came to this country to Christianize the Hawaiians. Let me repeat, and I measure my words in so doing, with nearly a half century of study and association with the Japanese, that I am persuaded that they will make as loyal and patriotic American citizens as any that we have."

IX.

No race but the Chinese being excluded from naturalization, the root stocks and the dominant strain of the Japanese being of the white race and being "free," the petitioner can not be excluded on the single ground that he is "one of the Japanese race, born in Japan."

If Section 2169 is applicable, we have shown that it deals with individuals and not with races; that if construed in its original acceptation it means one not of the black race; that like the Polynesian, who are descended

from the anicent Japanese, they speak an Aryan tongue and are of the Caucasian race; that the southern Japanese are certainly of the Mediterranean race from which we spring; that while the Japanese are more or less a mixed race, the dominant type is still Caucasian; that they are a people against whom the naturalization and immigration laws of the United States have never discriminated, and whose fitness for citizenship has never been denied; and that it imputes legislation inconsistent with the policy of the United States expressed in its treaties and its laws and a course of action beneath the dignity of Congress to imply that the Japanese as a race have been excluded by indirection and by inference.

Conclusion.

It is due to the court to say that we have inserted as part of our argument the opinions of scientific men not readily accessible in standard works, but this we have done to give the court the latest views of science on the race origin of the Japanese, a race origin in which they are intimately connected with the Polynesians, and the standard works furnish no adequate discussion upon the point in question, the materiai for the decision of which is now being collected by the men from whom we quote.

In conclusion, we ask this court to give to the great question submitted the informed and discriminating consideration which it deserves but has not yet received, and we confidently hope that such consideration will lead the court to hold that the United States, after extending a hand to welcome to its civilization a great and then well-contented people, did not coldly withdraw that hand, on the ground that they were among the undesirable and outcast of earth.

DAVID L. WITHINGTON,
Attorney for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1921.

TAKUJI YAMASHITA and CHARLES HIO KONO,
Petitioners-Appellants,

against

J. GRANT HINKLE, as Secretary of State of State of Washington,
Respondent-Appellee.

No. 545

On Writ of Certiorari to the Supreme Court of the State of Washington.

MOTION TO ADVANCE.

The petitioners-appellants, **Takuji Yamashita and** Charles Hio Kono, move that this case be advanced for hearing at an early date, for the following reasons, to wit:

1. A writ of certiorari was granted by this Court on November 1st, 1921, directed to the Honorable the Judges of the Supreme Court of the State of Washington, removing and certifying the above cause and the record and proceeding therein to this Court.

2. The sole question involved is the right of a subject of Japan to be naturalized under the laws of the United States by a court of competent jurisdiction therein.

3. The case is of great public interest inasmuch as it involves a determination of our national policy in regard

to the whole subject of naturalization as expressed in the Federal statutes controlling and limiting that question, and affects the rights of numerous aliens, and classes of aliens, now in this country to become citizens thereof.

4. Furthermore, great confusion exists in the decisions of both the State and lower Federal Courts in their interpretations of the scope and application of the Federal Naturalization Statutes and the question never has been decided by this Court.

An early hearing of this case is, therefore, very desirable, not only in the interest of the petitioners but in the public interest.

GEORGE W. WICKERSHAM,
Counsel for Petitioners.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

TAKUJI YAMASHITA and CHARLES HIO KONO, *Petitioners-Appellants,* *against* J. GRANT HINKLE, as Secretary of State of State of Washington, *Respondent-Appellee.*	No. 545

PLEASE TAKE NOTICE that on Monday, February 27th, 1922, at 12:00 o'clock noon, or as soon thereafter as counsel may be heard, Takuji Yamashita and Charles Hio Kono, the petitioners-appellants in the above-entitled cause, will submit to the Supreme Court of the United States a motion, a copy of which is annexed hereto, petitioning said Court to advance the above-entitled cause for hearing.

Dated, January 31st, 1922.

Yours, etc.,

GEORGE W. WICKERSHAM,
Attorney for Petitioners-Appellants,
Office & Post Office Address,
No. 40 Wall Street,
Borough of Manhattan,
New York City.

To:

Hon. L. L. THOMPSON,
Attorney-General of the State of Washington,
Attorney for Respondent-Appellee,
Olympia, Washington.

IN THE

Supreme Court of the United States

October Term, 1921.

TAKUJI YAMASHITA and CHARLES HIO KONO,
Petitioners-Appellants,
against
J. GRANT HINKLE, as Secretary of State of State of Washington,
Respondent-Appellee.

No. 545

On Writ of Certiorari to the Supreme Court of the State of Washington.

MOTION TO REASSIGN.

The above named petitioners, on Monday, February 27th, moved this Court to advance this case for hearing at an early date, in view of the fact that the case was one of great public interest, involving a determination of our national policy in regard to the subject of naturalization, etc. Before submitting this motion, petitioners' counsel had been in correspondence with the Honorable L. L. Thompson, Attorney-General of the State of Washington, attorney for the respondent-appellee, seeking his agreement to ask the Court to set the case for hearing not later than April 1st. Mr. Thompson, however, informed petitioners' counsel that the lack of reference books at Olympia made it necessary for him to brief the case in the East and consequently that he could not prepare a

brief for argument as early as petitioners desired, but that if petitioners would serve their brief by August 1st, he would be willing to stipulate to argue the case next October. Accordingly, petitioners' counsel accepted this suggestion, and Attorney-General Thompson endorsed upon a copy of the motion and notice, which was then filed with the Clerk of this Court, an acceptance of service and an agreement that the case might be advanced for hearing on the first Monday of October. Petitioners' counsel has just been advised that the Court on the sixth instant granted the motion to advance and set the case for hearing on March 20th, and he is in receipt of a telegram from Mr. Thompson, asking counsel to move for re-assignment. Petitioners suggest that possibly the Court may have overlooked the above mentioned stipulation endorsed on the notice of motion. In view of the above facts, petitioners pray the Court to reassign the case and set it for argument on the first Monday of October next.

Respectfully submitted,

GEORGE W. WICKERSHAM,
Counsel for Petitioners.

IN THE

Supreme Court

OF THE

UNITED STATES

OCTOBER TERM, 1922.

No. 177.

TAKUJI YAMASHITA and CHARLES HIO KONO, *Petitioners.*

against

J. GRANT HINKLE, as Secretary of State of the State of Washington, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF FOR RESPONDENT

L. L. THOMPSON,
Attorney General of Washington,
Attorney for Respondent.

E. W. ANDERSON,
of Counsel.

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IN THE

Supreme Court

OF THE

UNITED STATES

OCTOBER TERM, 1922.

No. 177.

TAKUJI YAMASHITA and CHARLES HIO KONO, *Petitioners.*

against

J. GRANT HINKLE, as Secretary of State of the State of Washington, *Respondent.*

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF FOR RESPONDENT

STATEMENT.

The statement contained in petitioners' brief correctly states the facts and is accepted by respondent.

ARGUMENT.

Petitioners have filed two briefs herein: (1) their original brief, and (2) a supplemental brief which consists of a copy of the brief of the late David L. Withington in the case of *United States v. Ozawa*, to be argued with the present action. In the first brief but one material contention is made, i. e., that section 2169 of the Revised Statutes is obscure and incapable of exact construction unless the phrase "free white persons" be construed as including all persons other than negroes, and that consequently the court should give to it this broad construction, notwithstanding the fact that since negroes are otherwise expressly included the effect of such a construction will be to make the section "as having no practical significance." The brief of Mr. Withington, on the other hand, relies upon the following general propositions: (1) that section 2169 does not modify the Act of June 29, 1906, (2) that in any event the section means free white persons as distinguished from persons of the black race, and therefore includes the Japanese, and (3) that in the alternative, the Japanese are of Caucasian rootstock and therefore free white persons within the contemplation of the statute. To this we may also add the subordinate and more or less irrelevant proposition that the Japanese are assimilable. It will thus be seen that the only point common to both briefs is the point that section 2169 means nothing since the passage of the

Acts of 1870 and 1875. We are therefore somewhat in doubt as to whether counsel for petitioners intends to urge the additional points made in the *Ozawa* brief. The fact that they have seen fit to expressly urge a point common to both briefs but have not referred to the other propositions would seem to justify that they have abandoned them. Since, however, they do not expressly repudiate those points and have brought them to the attention of this court, we feel compelled, at the risk of undue prolixity, to consider them.

I.

SECTION 2169 LIMITS AND MODIFIES THE ACT OF JUNE 29, 1906.

Approximately one-half of the *Ozawa* brief is devoted to the proposition that the Act of June 29, 1906, contains all the statutory law applicable to the naturalization of the Japanese, and is not controlled or modified by section 2169, but that that section, if it has any application at all, only applies to a few isolated sections of the Revised Statutes of 1873 which were not expressly repealed by the Act of 1906. In effect, this is but an indirect way of contending that section 2169 has been repealed by implication, although an express statement to that effect is carefully avoided.

The Act of July 14, 1870, (16 Stat. 254) provided "that the naturalization laws are hereby ex-

tended to aliens of African nativity and to persons of African descent." The Federal Statutes were codified in 1873 and in this codification the phrase "being a free white person" was dropped out of the first section in Title 30 relating to the naturalization of aliens, and a section numbered 2169 was inserted, which read:

"The provisions of this title shall apply to aliens of African nativity and to persons of African descent."

The Act of February 18, 1875, to correct errors and supply omissions in the Revised Statutes (18 Stat. 316), amended section 2169 to read:

"The provisions of this title shall apply to aliens, being free white persons, and to aliens of African nativity and to persons of African descent."

This is the form in which it now appears in the Revised Statutes.

The Act of June 29, 1906 (34 Stat., Part I, p. 596) consists of 31 sections. Sections 1 to 14, inclusive, create a Bureau of Immigration and Naturalization and deal with the courts and procedure by which naturalization may be effectuated. Sections 16 to 25 define certain crimes in connection therewith. Section 27 prescribes forms to be used. Section 29 makes an appropriation, and section 30 provides for the naturalization of all persons not citizens who owe permanent allegiance to the United States. Section 31 declares when the act shall take effect. Section 26 of the act expressly repeals sec-

tions 2165, 2167, 2168 and 2173 of the Revised Statutes, and section 39 of the Act of March 3, 1903 (32 Stat. 1213) but makes no mention of section 2169.

We shall consider this question (1) as an original proposition, (2) viewed from the standpoint of legislative history, (3) as construed by the executive department of the Government, and (4) as considered by the lower Federal courts.

1. As an Original Proposition.

It will be observed that the repealing section in the Act of 1906, although it expressly repeals sections which precede section 2169 in the Revised Statutes, makes no mention of that section. It is fundamental that statutes must, if possible, be given a consistent construction, and that repeals by implication are not favored. It would seem that the application of these rules must compel the conclusion that the Act of 1906 is limited by section 2169. The *Ozawa* brief, beginning upon page 11, attempts to avoid the obvious application of these rules of construction by contending that section 2169 is applicable only to those sections of the Revised Code of 1873 left unrepealed by the Act of 1906. As is pointed out, however, the only sections of that act which are now of any practical force are sections 2166, 2172 and 2174, referring to the naturalization of soldiers and sailors, seamen and minor children. The effect of the contention is to impose a racial limitation upon these special classes who at the same time receive special consideration in

other respects when there is no such limitation imposed upon ordinary alien applicants. Such a construction would be without reason and we think must be rejected.

The *Ozawa* brief emphasizes the proposition that section 2169 is an enlarging and not a restrictive clause (brief, p. 13). This is clearly incorrect, because if this were so, there would be no necessity for section 2169, since the right of negroes to be naturalized under such construction would have been deemed to have been covered by section 2165.

Even if this were true, however, the effect would not be different unless section 2169 be rejected as mere legislative surplusage, because unless this is done, the phrase "free white persons," in the section, must be taken as explanatory of the word "alien" in section 2165, which reads:

"An alien may be admitted to become a citizen of the United States in the following manner, and not otherwise."

It therefore appears that even though we consider the section as an enlarging clause, it must have been passed with some purpose in view, and that only purpose would be that without it aliens other than those of the white race would not be included, which would lead to the same result as though the section were deemed technically restrictive.

The better view, however, is that since section 2169 is subsequent to section 2165, it was passed for

the purpose of restricting the word "alien" as used in the former section.

We see no merit in the point that the passage of the Chinese Exclusion Act of 1882 indicates a contrary legislative intent (*Ozawa* brief, p. 14). The general naturalization act as amended classified applicants according to color, while the Chinese Exclusion Act made a classification based upon nationality. The fact that the first act also included the other is not material. The only deduction to be drawn from the Act of 1882 is that Congress, in so far as the Chinese were concerned, was not content to leave the question dependent upon a judicial determination of a question of fact, possibly based on ethnological grounds.

The contention is also made that the effect of the words "provisions of this title" in section 2169 is to make the section inapplicable to the Act of 1906 (*Ozawa* brief, p. 12). Title XXX, which is referred to, included all the laws relating to the naturalization of aliens. The act of 1906 with some three or four exceptions, including section 2169, repealed these sections and substituted other provisions upon the same subject, but did not repeal section 2169. The word "title," was simply used in the original revision for purposes of convenience and was not used in the section as originally enacted (16 Stat. 254). As used in the revision of 1873 it referred to all existing laws with respect to naturalization, and when Congress

failed to repeal the section while at the same time it substantially repealed the remainder of the title, the only reasonable construction is to suppose that it intended the substitute act to be subject to the same limitations as was the original measure.

Pages 17 to 26, inclusive, of the *Ozawa* brief, are devoted to a discussion of the trend of legislation with respect to immigration since 1798. It is said that because Congress has never, except in the case of the Chinese, barred immigrants for racial reasons alone, then therefore the same liberality ought to be announced with respect to naturalization, even if that process requires the repeal of a statute by judicial decree. We are unable to appreciate the logic of this argument. The tolerated presence of an alien race within our borders, encouraged throughout our early history for economic reasons, is quite a different thing than the exercise of those rights which appertain to political equality by such aliens. The requirements with respect to naturalization have always been more drastic than those governing immigration for reasons which are quite obvious. There is nothing in the immigration statutes which aids in the construction of section 2169, and we are not aware of any legal principle which can make them applicable. The question of whether the same liberality ought to obtain in both cases is, of course, legislative, and not judicial.

Beginning upon page 23 of the *Ozawa* brief, attention is directed to the fact that the Immigration

Act of February 5, 1917, as it originally came from the House, excluded, subject to existing treaties, "Hindoos and persons who cannot become eligible, under existing law, to become citizens of the United States by naturalization," and to the further fact that this clause in deference to the protest of the Japanese Government, was stricken from the bill as finally enacted. We can see nothing in this fact which supports the proposition for which it is advanced. The very fact that the act as originally presented seemed to refer to existing racial barriers, amounts to a recognition by the framers of the act, at least, that section 2169 was then in force, notwithstanding the Act of 1906. It is also quite reasonable to conclude that the Japanese Government recognized the fact that under the existing laws the Japanese were not eligible to naturalization, and that Congress, by striking the clause objected to, was of the same opinion. Otherwise, there would have been no occasion for the protest and no necessity for the amendment of the act. This seems to have been the opinion of the senators who participated in the debate, as is shown by the quotations set forth upon pages 25 and 26 of the *Ozawa* brief.

The suggestion made upon page 27 of that brief that a contrary construction would in some way violate the treaties of 1895 and 1911 with Japan is too obscure for us to comprehend. Neither of these treaties refer in any way to the matter of naturaliza-

tion, and in so far as we have been able to ascertain, the Japanese Government, officially at least, has never made any such contention, although the Federal courts have uniformly refused to naturalize Japanese since the statute was first enacted. The favored nation clause in these treaties, even if applicable, would be immaterial, because naturalization has never been regulated by treaties made with foreign countries.

Beginning upon page 28 of the *Ozawa* brief, reference is also made to the Act of May 9, 1918 (40 Stat. 542), which amends the Act of June 29, 1906, in some respects. The only reference made in this act to that section is found in section 2, which provides:

"That all Acts or parts of Acts inconsistent with or repugnant to the provisions of this Act are hereby repealed; but nothing in this Act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh subdivision of this Act and under the limitation therein defined."

Since this act was amendatory to the Act of 1906, it seems to constitute a clear legislative recognition of the fact that the latter act is limited by section 2169; otherwise, there would be no meaning to the reference. The obscurity which the *Ozawa* brief appears to find in the clause "except as specified in the seventh subdivision of this Act and under the limitations therein defined" is not apparent to us. The Act of 1918 adds seven new subdivisions to section

4 of the Act of June 29, 1906, numbered from 7 to 13. The 7th subdivision to section 4 as thus amended, provides for the naturalization of certain persons in the military service. The saving clause in the repealing section, *supra,* obviously refers to this subdivision and was inserted to meet a possible contention that the effect of the subdivision was to permit the naturalization of persons other than free white persons and negroes, who were not named specifically by reference to their nationality in the amendatory statute. The section is perhaps subject to some technical criticism with respect to its form, but the legislative intent seems to be quite apparent. The following cases reach this conclusion:

In re Para, 269 Fed. 643;
In re En Sk Song, 271 Fed. 23;
Petition of Easurk Emsen Charr, 273 Fed. 207.

This seems also to have been the view of the House Committee on the Revision of Laws of the 67th Congress, First Session. This committee recommended the passage of H. R. No. 12, which was a revision of the laws of the United States, and which passed the House on May 16, 1921. Section 37 of this revision is a re-enactment of the repealing clause in the Act of 1918 except that it strikes the words "of this act" and inserts "of section 3675 of the Code of the Laws of the United States." Section 3675 is a copy of section 4 of the Act of 1906, as amended by

the Act of 1918, so that it is apparent that the codifiers had no doubt but that the reference to the seventh subdivision of this act was a reference to the seventh subdivision of section 4, as amended.

Whatever, therefore, may have been the original ambiguity in the Act of 1906, Congress, by the passage of the Act of 1918, has conclusively resolved that doubt against petitioners, because, when it modified the naturalization requirements for aliens in the military service, it expressly required that its action in that regard should not be regarded a repeal or enlargement of section 2169. This is a distinct recognition not only of the fact that section 2169 was still in existence, but also of the further and determining fact that it was not restricted to Title XXX of the original act, but operated as a limitation upon the Naturalization Act of 1906.

2. Legislative History.

Beginning upon page 16 of the *Ozawa* brief reference is made to the fact that in 1905 President Roosevelt recommended to Congress the revision of our naturalization laws and that in dealing with the different subject of immigration recommended that religious and racial differences be not made the basis of exclusion. From this it is concluded that the President meant the same remarks to apply to naturalization legislation, and a secondary implied conclusion is therefore drawn that the Act of 1906 was passed with the same understanding. A reference

to the legislative history of the act will show the contrary to be the fact. The Act of 1906 was originally introduced in the House of Representatives as H. R. No. 15442. It was drawn by a sub-committee of the House Committee on Immigration and Naturalization, and its passage was unanimously recommended by the committee (House Rep. 1789, House Reports, Vol. I., Nos. 2-2656, 59th Congress 1st Session). This report, after relating the history of the legislation of the bill, continues:

"Your committee has not sought to make any radical changes in the principles of existing law governing naturalization, except in two particulars. It is the opinion of your committee that the frauds and crimes which have been committed in regard to naturalization have resulted more from the lack of any uniform system of procedure in such matters than from any radical defect in the fundamental principles of existing law governing in such cases. The two changes which the committee has recommended in the principles controlling in naturalization matters, and which are embodied in the bill submitted herewith, are as follows:

"First. The requirement that before an alien can be naturalized he must be able to write either in his own language or in the English language, and read, speak, and understand the English language; and

"Second. That the alien must intend to reside permanently in the United States before he shall be entitled to naturalization."

The report then analyzes the bill section by section. Referring to the repealing section, which subsequently became section 26, the committee said:

"Section 28 provides for the repeal of certain sections of existing law, the provisions of which have been embodied in the bill submitted herewith, except in two cases, and in those your committee believes that the sections are no longer necessary."

The report then concludes by submitting as an appendix copies of sections "which are proposed to be repealed." These sections consist of sections 2165, 2167, 2168, 2173 and section 39 of chapter 1012, U. S. Statutes of 1903. When the bill came before the House, the House resolved itself into a committee of the whole and Representative Bonynge of the Naturalization committee thus explained the bill:

"I think, perhaps, all members of the committee are fully convinced that the naturalization laws need revision and amendment. We have at the present time, with only a few slight amendments, naturalization laws as they were written by James Madison in 1795. Under the Constitution Congress is authorized to establish a uniform rule of naturalization. The naturalization laws at the present time do not prescribe a uniform system of naturalization nor establish any code of procedure in such cases. * * * The bill which we present today *does not change the fundamental law* in reference to naturalization except in two particulars, to which I will address myself a little later, but it does provide for a general and uniform system of naturalization to be enforced throughout the United States. * * *

"The bill that is presented today undertakes to correct the abuses that have grown up under our lax and careless system of naturalization, or perhaps I ought to say that have grown up because we have no system of naturalization which is uniform throughout the United States. * * *

"Perhaps I can not do better than to give a general outline of the provisions of the bill. As I said a few moments ago, it does not seek to change the fundamental principles that have governed in naturalization cases from the foundation of the government, except in two particulars. Those two particulars, Mr. Chairman, are, first, that before an alien can become naturalized, if this bill shall be enacted into a law, it will be necessary that he shall satisfy the court that he is able to write either in his own language or in the English language, and able to read, speak, and understand the English language. That is a new qualification required of the alien for naturalization." (Italics ours)

(Cong. Record, Vol. 40, p. 3640.)

"The other additional qualification that is required from the alien is that he shall in his petition for naturalization declare that it is his intention to reside permanently in the United States. * * * The rest of the bill, Mr. Chairman, is in effect either administrative or *provides a code of procedure,* stating the method which an alien shall adopt to become naturalized." (Italics ours)

(Ibid., p. 3643).

It was thereafter debated and amended in the House (40 Cong. Rec., pp. 7033, 7761, 7777 and 7869) and was passed as amended. Upon its arrival in the Senate, it was referred to the Senate Committee, (ibid., p. 7913) and was reported back with certain amendments (ibid., p. 9009). The House at first refused to accede to the Senate amendments (ibid., 9381-9407), whereupon a joint committee was appointed, these differences reconciled (ibid., 9505, 9576 and 9691) and the bill finally passed (ibid., 9680-9777).

It is unnecessary to quote from the various debates. It was thoroughly considered in both houses, section by section, and the debate was unusually exhaustive. It seems indisputable that the original statement of the committee that the only changes in the fundamental law were with regard to educational qualifications seems to have been accepted without question by everybody. It is unthinkable that the Western members of Congress would have permitted such a far-reaching piece of legislation to pass, at least without debate, and when to the silence of the members is added the assurance of the committee that no such change was contemplated, the conclusion is impelling that Congress intended the act to be subject to section 2169.

Further support for this conclusion is likewise found in H. R. No. 12, which is a compilation of the Laws of the United States up to March 4, 1919, which compilation was prepared by the House Committee upon the Revision of Laws, and passed by the House of Representatives May 16, 1921. (61 Cong. Record, 67th Cong., 1st Session, 87-14-77). This compilation groups all the existing laws relating to immigration and naturalization under a single chapter known as "Title 23". Section 3689 of the compilation is a reenactment of section 2169, so that it reads as follows:

"The provisions of this chapter shall apply to aliens, being free white persons, and to aliens of African nativity, and to persons of African descent."

A reference to the Congressional Record, before cited, will show that this compilation was the result of several years of very careful work upon the part of the committee. The compilation as finally presented to Congress shows that it was the opinion of the committee that section 2169 modifies the Act of 1906, since the explanation of the bill made to Congress shows that it did not purport to contain any new legislation, but was only intended as an orderly arrangement of the statutes existing upon March 4, 1919.

3. Executive Construction.

The departments of the Federal Government charged with the handling of naturalization matters have uniformly given effect to section 2169 subsequent to 1906, as is evidenced by the reports of the Division of Naturalization, afterwards the Bureau of Naturalization.

In the report of the Department of Commerce and Labor for 1907, page 198, it is said:

"Some (courts) have apparently construed section 2169 of the revised statutes to mean that only Chinese or 'Mongolians' are excluded from naturalization, and that all other races are eligible."

Report for 1908, page 294:

"Section 2169 of the Revised Statutes forbade the naturalization of all aliens who are not 'white persons or persons of African nativity or African descent,' and is still operative."

At page 295, see tabulation showing three suits pending to cancel certificates as having been issued contrary to R. S. 2169.

Report for 1909, page 287, shows that two certificates were cancelled that year for violation of R. S. 2169. At pages 300, 301 and 302, report shows twenty-one persons were denied citizenship "because they were not white persons in the sense of those words in section 2169 of the Revised Statutes." Report does not show to what races these twenty-one belonged. Four were denied admission in New York, six in North Dakota, eleven in Washington.

Report for 1910, at pages 352-353:

"Moreover, in some places the view is apparently held that if the negroes could justly be naturalized en masse it is both useless and inconsistent to be critical in bestowing a like status on the persons of any other races of mankind who desire it."

Pages 363-364 show that four were denied certificates under Revised Statutes, 2169, while at page 368, report shows one certificate was cancelled under same section.

Report for 1912, at page 381:

"The present naturalization law vindicates the wisdom of 'the fathers,' for after a most unusual study and consideration, and with the benefit of a century of actual experience, it embodies the qualifications for naturalization that they had originally considered essential."

In 1913, the separate Department of Labor was created, and the Division of Naturalization changed

to the Bureau of Naturalization. Report of Department of Labor for 1913, at pages 362-363, shows four petitions were denied under Revised Statute 2169: One in Michigan, one in Minnesota, one in Montana, one in New Jersey. At page 370:

"Besides these known reasons for refusing to accept and file a petition, there are many others which raise a doubt in the clerk's mind; but in such cases, he can only express his doubt to the applicant, leaving it to the latter to assume the chance under existing conditions of making a petition which may be denied by the court. As an illustration of such case, there may be given, say, the application of a Tibetan, of a Hindu, of a Malay. To the eye of a clerk such applicant may appear to be neither a white person nor an alien of African origin, to whom alone the privilege of becoming naturalized is confined by section 2169, Revised Statutes. As he cannot anticipate the action of the court in such a case, there remains nothing for him to do beyond explaining to the applicant the grounds of his doubt, and accepting the petition, if the applicant is insistent."

Report for 1914, at pages 541 and 542, shows three persons were denied naturalization under Revised Statutes, 2169: Two in South Carolina and one in Nebraska. At page 543, report says:

"Attention is particularly drawn to the last item in the first of the two foregoing groups of denials. It is in effect a statement from the judges of the naturalization courts of the United States, state and federal, that with the exception of two cases in South Carolina and one case in Nebraska not one of the 118,572 petitioners for naturalization was other than a 'free white person or person of African nativity or an alien of African descent,' *section 2169 of the*

United States Revised Statutes excluding all other aliens from the privilege of becoming citizens by court process. The statement is merely adverted to here as one of natural interest in view of the fact that our alien population is composed of elements coming from practically every race and every nationality of the habitable globe." (Italics ours).

Report for 1915, at pages 387-388, shows eight aliens denied admission under 2169, as follows: California, one; Louisiana, one; Montana, one; Oregon, one; Rhode Island, two; South Carolina, one; and Washington, one. At page 389:

"Only 8 applicants of all the various races who applied for citizenship were denied for the reason that they were held to be neither 'white persons' nor 'persons of African nativity or African descent,' *and therefore not eligible to become citizens of this country under the limitation provided in section 2169 of the United States Revised Statutes.* The figures given suggest the very comprehensive meaning, in the view of the courts, of the words above quoted from the statute." (Italics ours).

Report for 1916, pages 432-33-34, shows three denials under Revised Statutes, 2169, as follows: Hawaii, one; Pennsylvania, one; Washington, one.

Report for 1917, pages 479-80, shows fifteen denials under section 2169, as follows: California, three; Hawaii, one; Illinois, two; Montana, three; North Dakota, one; Oregon, one; Pennsylvania, two; Wisconsin, one; Wyoming, one.

Report for 1918, at pages 586-87, denials under section 2169 total twenty-six, segregated as follows:

California, four; Colorado, ten; Indiana, one; Montana, one; New Jersey, nine; Wyoming, one.

Report for 1919, at pages 756-57, denials under section 2169 total twenty-one as follows: Arkansas, two; Idaho, one; Indiana, four; Iowa, one; Montana, one; New York, four; Oregon, three; Washington, four; Wyoming, one.

Report for 1920, pages 771-72, denials under section 2169 total thirteen, as follows: California, one; Idaho, one; Illinois, one; Indiana, seven; Massachusetts, two; North Dakota, one.

We have found but one officially reported opinion of the Attorney General of the United States which touches upon this question since 1906, but this opinion, curiously enough, was given by former Attorney General Wickersham to the Secretary of Commerce and Labor under date of July 30, 1909 (27 Ops. Atty. Gen., p. 507). In that opinion Mr. Wickersham had occasion to consider the effect of section 1994 of the Revised Statutes as applied to a woman who had married a citizen of the United States in 1909. Section 1994 provides:

"Any woman who is now or may hereafter be married to a citizen of the United States, *and who might herself be lawfully naturalized,* shall be deemed a citizen." (Italics ours).

Attorney General Wickersham concluded that the only limitation imposed upon the right to be naturalized under this section was a racial limitation. In other words, the woman must be a free white per-

son within the contemplation of section 2169. This is apparent from the fact that after discussing various authorities, he said:

"The authorities above cited seem to settle the proposition that the words 'who might herself be lawfully naturalized,' in the Act of February 10, 1855, and section 1994 of the Revised Statutes, *refer to the class or race who might be lawfully naturalized,* and that compliance with the other conditions of the naturalization laws is not required." (Italics ours).

While this opinion does not expressly refer to the Act of 1906, it seems obvious that if the effect of that act was to abrogate racial disqualifications with respect to naturalization as is contended in the *Ozawa* brief, then the repeated references which are made in the opinion to section 2169 and to racial classes were entirely unnecessary. This opinion may perhaps furnish an explanation of the failure of the main brief of petitioners to expressly adopt the views stated in the *Ozawa* brief upon this subject.

4. Judicial Authorities.

We are unable to understand the basis of the statement made upon page 31 of the *Ozawa* brief that "the point that section 2169 does not restrict the Uniform Act of June 29, 1906, but is confined by its terms to Title XXX, has never been adjudicated at all," because a number of Federal courts have expressly passed upon the question adversely to petitioners, either directly or by way of dictum.

In *Bessho v. U. S.*, 178 Fed. 245, the court considered specifically only the effect of Revised Statute 2169 upon the act of July 26, 1894 (28 Stat. 124) relating to persons who had served in the Navy and held that the Act of 1894 was limited by 2169. The court, however, based its conclusion upon the fact that the Act of 1906 did not repeal Revised Statute 2169.

"By this legislation a new and complete system of naturalization was adopted, all the details of which, together with the method of procedure, and the courts having jurisdiction of it, were set forth and designated, and all acts or parts of acts inconsistent with or repugnant to its provisions were repealed. In section 26 of that act is found an express repeal of sections 2165, 2167, 2168 and 2173 of the Revised Statutes * * *. These repealed sections are all included in Title 30 of said Revised Statutes and demonstrate beyond doubt that the Congress carefully considered all of the provisions of that title and that it intended that the unrepealed sections thereof should still remain in force. Among those unrepealed is section 2169, which we thus find to be virtually reenacted, and declared to be one of the rules under which future naturalizations are to be conducted. * * *"

In re Alverto, 198 Fed. 688;
In re Rallos, 241 Fed. 686.

Held that the Act of 1906 did not expressly or by implication repeal Revised Statutes 2169.

In re Mallari, 239 Fed. 416, while differing from the cases last above cited with respect to the effect of section 30, Act of 1906, the court held that Revised Statutes 2169 was not repealed by the Act of 1906.

"The act of which section 30 forms part was obviously intended to cover fully the subject of naturalization. It repealed various sections of the Revised Statutes; but it did not repeal section 2169, which originally formed a part of the naturalization act of 1870, as amended in 1875, * * *. Until the passage of section 30, *supra*, only persons described in section 2169 could be naturalized."

In re Bantista, 245 Fed. 765.

"While we are of opinion that section 2169 of the Revised Statutes was not repealed by the Act of June 29, 1906, we think we have clearly shown by the proceedings in Congress that it was expressly amended by that act so as to admit to citizenship all persons not citizens who, owing 'permanent allegiance to the United States' and possessing the other qualifications provided by the statute, became residents of any state or organized territory of the United States. * * * It must, therefore, have been the purpose of Congress to so modify section 2169, R. S. as to admit to citizenship the Filipino * * *".

U. S. v. Balsara, 180 Fed. 694, 103 C. C. A. 660.

The language of this decision upon the construction of the statutes was dictum as it was not necessary to the conclusion reached, but is perhaps the best statement upon the subject.

"Counsel for certain Syrian interveners as *amici curiae* contend that the words 'free white persons' were used simply to exclude slaves and free negroes. If so, of course, all other aliens were included. This is enforced by the further argument that the Act of June 29, 1906, * * * repealed section 2169, Rev. St. U. S. by necessary implication, and that all aliens except those expressly excluded, like the Chinese, are now eligible to citizenship. The Act

of 1906 does provide for a uniform rule for the naturalization of aliens throughout the United States. Section 4, regulating proceedings, like section 2165, Rev. Stat. U. S., provides 'that an alien may be admitted to become a citizen of the United States in the following manner and not otherwise.' But section 2169, *supra,* limited the application of the whole title to persons being free white persons or of African race, and section 26, the repealing clause of the Act of 1906, makes no mention of section 2169. Of course, if the latter is inconsistent with or repugnant to the act, it is repealed, though not mentioned. *But we do not think it is. Indeed, the form annexed for declarations of intention requires the applicant to state his color, as well as his complexion. It seems to us incredible that Congress could have intended to make such a departure from existing law by implication merely."* (Italics ours).

In the case of *In re Geronimo Para,* 269 Fed. 643, the court had before it the question of whether a Japanese who had served in the military forces of the United States and therefore came within the seventh subdivision of section 4 of the Act of 1906, as amended by the Act of May 9, 1918, was entitled to be naturalized. The court answered the question in the negative, saying:

"The question is whether the words 'any alien,' appearing in the amended act of May 9, 1918, are broader than the words 'any alien' used in section 2166 of the Revised Statutes which I have above quoted. This last statute was passed upon by the Circuit Court of Appeals of the Fourth Circuit and by Judge Chatfield and Judge Hanford in the decisions I have cited, and the words 'any alien' were held to be limited, by section 2169 of the Revised Statutes, to white persons and aliens of African nativity and

to persons of African descent. It might well be held under the reasoning of these cases that section 2169 still limited the provisions of the Act of May 9, 1918, except so far as that act by expressly covering native-born Filipinos and Porto Ricans enlarged the former provisions *pro tanto,* even if section 2169 had not been referred to; but it seems clear that the words of section 2 of the Act of May 9, 1918, expressly providing that 'nothing in this act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh subdivision of this act and under the limitation therein defined,' were intended to preserve the definition of the classes of persons who could become citizens of the United States except certain Porto Ricans and Filipinos.

"The Naturalization Act of June 29, 1906, repealed sections 2165, 2167, 2168, and 2173 of the Revised Statutes, while it retained section 2169, defining the classes of aliens which may be naturalized. This section is expressly preserved and practically re-enacted by section 2 of the act of 1918. If the words 'any alien' are to be taken literally, not only would a meaning be given wholly contrary to existing judicial interpretation, but all the definitions of section 2169 would be rendered meaningless, and even Chinese who had served in the army could be naturalized, in spite of the express language to the contrary."

A similar conclusion was reached in the case of *In re En Sk Song,* 271 Fed. 23, in which case a native of Korea who was a subject of Japan and an honorably discharged soldier in the American Army was refused naturalization under the provisions of subdivision 7 of section 4 of the Act of 1906, as amended, purely upon racial grounds. Considering

the contention that section 2169 did not modify section 4 of the Act of 1906, as amended, the court said:

"By the Act of Congress of June 29, 1906 (34 Stat. 596), a pronounced departure in the matter of the procedure to be followed in naturalizing aliens was ordained. The action then taken was intended to provide 'for a uniform rule for the naturalization of aliens throughout the United States.' *U. S. v. Morena,* 245 U. S. 392, 38 Sup. Ct. 151, 62 L. Ed. 359. It was concerned with matters of procedure almost entirely. The requirements of the Revised Statutes providing for at least five years' residence in the United States, and for the making of the declaration of intention at least two years prior to the application for final citizenship papers (sec. 2165, R. S.) were substantially reincorporated into the new provisions. Section 2169, R. S. (Comp. St., sec. 4358), originally limiting the privileges of naturalization to 'free white persons,' and later to persons of African nativity or descent in addition (see *In re Singh* (D. C.) 257 Fed. 209, 210), was left intact.

"* * * Repeals by implication are not favored, and I am persuaded that, if nothing more were contained in the law than the subdivision 7 of the act of May 9, 1918, the privilege of naturalization would still have to be limited by the terms of section 2169. But Congress made assurance doubly sure, so to speak, by the provision above noted, contained in section 2 of the Act of May 9, and thereby expressly recognized and insisted upon, as a national declaration of policy, the continued and controlling efficacy of section 2169, except in the instance referred to, and that instance, I am persuaded, is the privilege then for the first time accorded to native-born Filipinos."

A similar conclusion was reached with respect to a Korean who had served in the United States

Army in the case of *Petition of Easurk Emsen Charr*, 273 Fed. 207. The court said, in part:

"The amendments made were not to the title as a whole, but primarily to section 4 of the Act of June 29, 1906, 34 Stat. 596. This section deals, not with persons eligible to become naturalized, but with the procedure to be taken and the showing to be made by those elsewhere defined to be eligible. This in itself is significant in its bearing upon the specific interpretation we are required to make.

"* * * Incidentally it has been urged that section 2169 was repealed, by implication, by the Act of June 29, 1906 (34 Stat. 596). The contention has uniformly been rejected, and, notably, in cases involving Filipinos. *In re Alverto,* (D. C.) 198 Fed. 688; *In re Rallos* (D. C.) 241 Fed. 686; *In re Lampitoe* (D. C.) 232 Fed. 382; *United States v. Balsara,* 180 Fed. 694, 103 C. C. A. 660.

"* * * The repealing section of the act of 1906 did not include section 2169, and the present act of 1918 expressly preserves it in force, 'except as specified in the seventh subdivision of this act and under the limitation therein defined."

In addition to these authorities which expressly consider the question, attention is directed to the fact that the lower Federal courts have in many cases subsequent to 1906 construed and applied section 2169 without expressly considering the effect of the Act of 1906. These cases, however, must be taken as authority of some weight, at least; otherwise there would have been no occasion for discussion with respect to section 2169.

II.

SECTION 2169 IS NOT A NULLITY.

Petitioners make substantially this argument, and it is virtually the only argument advanced in the main brief. It is said that in 1790, when the phrase "free white persons" was first used in the Act of March 26, 1790 (1 Stat. 103), the privilege of naturalization was intended thereby to be offered to all free white persons who were not black, and that consequently when the Act of July 14, 1870, (16 Stat. 254), extended the privilege to "aliens of African nativity and to persons of African descent," section 2169 "had no practical significance." This is but a diplomatic way of stating that Congress, when it inserted the phrase "free white persons" in the section by the Act of February 18, 1875 (18 Stat. 316) was indulging in a legislative action of a meaningless character. The extraordinary nature of this contention must at once be apparent to the court when it is remembered that it is a primary rule of statutory construction that courts are bound, if possible, to give to a statute a construction which will give it some force and effect rather than to import to the legislature the intention of enacting a meaningless measure.

As was said in the case of *Market Co. v. Hoffman,* 101 U. S., 112 (115):

"It is a cardinal rule of statutory construction that *significance* and effect shall, if possible, be accorded to every word. As early as in Bacon's

Abridgement, section 2, it was said 'that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or *insignificant*'." (Italics ours).

This quotation seems peculiarly pertinent in view of the position taken in petitioners' brief that section 2169 is now of no practical significance. See also, *Unity v. Burrage,* 103 U. S. 447, 457:

> Black on Interpretation of Law, 2d Ed., p. 154.
> 21 R. C. L. 1004.

We shall consider the question in the same manner in which the preceding proposition was discussed.

(1) Legislative History of Section 2169.

It is probably true that at the time of the passage of the Act of March 26, 1790, Congress did not have in mind the question of the naturalization of Asiatic aliens, although it is also probable that the possibility of naturalization of Indians was considered, because as early as 1827, Chancellor Kent in volume 2, page 72, of his Commentaries, in discussing this clause of the statute, says:

"The Act of Congress confines the description of aliens capable of naturalization to 'free white persons.' I presume this excludes the inhabitants of Africa, and their descendants; and it may become a question, to what extent persons of mixed blood are excluded, and what shades and degrees of mixture of color disqualify an alien from application for the benefits of the act of naturalization. Perhaps there might be difficulties also as to the copper-colored natives of America, *or the yellow or tawny races of the Asiatics,* and it may well be doubted whether any of

them are 'white persons' within the purview of the law." (Italics ours.)

The early Congressional debates throw little light upon the subject, and the phrase seems to have been carried through subsequent naturalization acts prior to 1870 without debate.

Act of January 29, 1795, 1 Stat. 414;
Act of April 14, 1802, 2 Stat. 153;
Act of March 22, 1816, 3 Stat. 258;
Act of May 26, 1824, 4 Stat. 69.

The Civil War resulted in the emancipation of the negroes and the consequent passage of the Act of July 14, 1870 (16 Stat. 254) which act extended the right of naturalization to persons of African nativity and descent. This act, however, did not repeal the limitations theretofore made by prior acts which required aliens to be free white persons. When this measure was pending before Congress, Senator Charles Sumner offered an amendment to strike the word "white" from the statute as it then existed so that all racial barriers would be eliminated, but the amendment was rejected through the efforts of certain Western senators who objected upon the ground that the striking of the word would authorize the naturalization of Asiatics. (Congressional Globe, 1869-70, Part 6, 5114-5125; 5148-5167; 5168-5177).

We quote the following excerpts from the debate which showed the current senatorial view at that time:

Mr. Tipton. "I wish to say that before this question is ever settled in this country Senators will have to meet the issue whether Christian civilization can be sacrificed or brought in dangerous competition with any system of paganism."

(Ibid, p. 5124.)

Senator Stewart of Nevada and Senator Williams of Oregon strenuously opposed the amendment of Senator Sumner as it would authorize naturalization of Chinese.

Mr. Stewart. "* * * The proposition of the Senator from Massachusetts (Mr. Sumner) is nothing more nor less than this: to extend naturalization to Chinese coolies. * * * They are pagans in religion, monarchists in theory and practice, and believe in their form of government, and no other, and look with utter contempt upon all modern forms as dangerous innovations; who believe in their monarchial form of government as they believe in their religion; who will sacrifice life for it; who will commit suicide for their devotion to their government and their religion. * * *."

(Ibid, p. 5150.)

Mr. Stewart. "* * * The negro was among us. * * * He was born here. He had a right to protection here. He had a right to ballot here. He was an American and a Christian, * * *. But how is it with these Asiatics? They have another civilization at war with ours; a language which we shall never understand—a language which is more arbitrary and difficult than any other spoken language."

(Ibid, p. 5152.)

Mr. Sherman. "Mr. President, the amendment offered by the Senator from Oregon raises the ques-

tion whether we shall ingraft Chinese in the naturalized population of the United States. The amendment offered by the Senator from Massachusetts raises the question *whether we shall adopt by our naturalization laws the whole pagan races of the world and ingraft them in our population* * * *". (Italics ours.)

(Ibid, p. 5152.)

Mr. Williams. "* * * Now sir, I ask every candid man in this body, does the Declaration of Independence mean that Chinese coolies, that the Bushmen of South Africa, that the Hottentots, the Digger Indians, heathen, pagan and cannibal, shall have equal political rights under this government with citizens of the United States.

* * * "Elements that will not coalesce with the other elements of our population and form together a national entity are dangerous to the peace and integrity of this nation. Mongolians, no matter how long they may stay in the United States, will never lose their identity as a peculiar and separate people. They never will amalgamate with persons of European descent; * * *."

"It is only necessary to refer to our own history to illustrate the truth of the remark. Look at the inevitable and disastrous results that have followed from the contact of the white race and the Indians upon this continent. No amalgamation has occurred or is possible; * * *."

(Ibid, p. 5155-5156.)

Mr. Thayer. "Will he permit the naturalization laws to be applied to the Indians, will he permit Indians to avail themselves of the naturalization laws?"

(Ibid, p. 5161.)

On pages 5164 and 5165 there is an interesting argument between Senators Trumbull, Tipton, Thurman and Saulsbury, on the question of whether a naturalization law which excludes persons because of color is a uniform law, Senator Trumbull holding such a law unconstitutional.

Mr. Trumbull. "I do hope that now the Senate will not act so inconsistently as to vote down this amendment. (Mr. Sumner's). * * * We have now by a distinct vote placed upon this bill a provision that any person of the African race or of African descent may be naturalized. We have struck the word 'white' out of the naturalization so far as it applies to the Hottentot, to the pagan from Africa. Now, it is proposed to deny the right to the Chinaman, * * *".

(Ibid, p. 5177.)

It will thus be seen that the unanimous legislative view of the times seems to have been that the phrase "white persons," as it then stood in the naturalization laws, operated to bar Asiatic races in general; otherwise there would have been no reason for Senator Sumner to have offered the amendment and no logical argument for the opponents thereto.

We appreciate the fact that perhaps it may be suggested that these statements should not be considered by the court under the rule announced in *Duplex Printing Press Co. v. Deering,* 254 U. S. 443, and cases cited. We have inserted them (1) for the reason that this is done upon pages 25 and 26 of the *Ozawa* brief with respect to another statute, and (2)

because the fact that such an amendment was offered and rejected with practically the unanimous view of all persons participating in the debate, that it would change the then existing statute, is proper to be considered in the same way that reports of Congressional committees or explanatory statements of committee members are resorted to. *Duplex Printing Press Co. v. Deering, supra.* That is to say, while the individual view of an individual legislator may not be material, the unanimous view of all participants in the debate upon an amendment which is rejected ought to be given as much weight as is the explanatory statement of the member of a committee.

In 1873 the Statutes of the United States were revised, and through an error the phrase "free white persons" was omitted from the first section of Title XXX, dealing with naturalization. Accordingly, in 1875, the Act of February 18, 1875 (18 Stat. 316), which was an act to correct errors and supply omissions in the Revised Statutes, contained a section which amended section 2169 so that it read as follows:

> "The provisions of this title shall apply to aliens, being free white persons, and to aliens of African nativity and to persons of African descent."

The Congressional Record showed that this bill was originally presented to the House by Representative Poland in behalf of the Committee on the Revision of the Laws of the United States. (3 Cong.

Record, Part 2, p. 1080.) Mr. Poland, in behalf of the committee, thus explained the purpose of the bill:

"The original naturalization laws only extended to free 'white' persons. That was the condition of the naturalization laws for a great many years. A very few years since, upon some bill, Mr. Sumner of Massachusetts, then in the Senate, moved to strike out the word 'white' from the naturalization laws, and it was objected to upon the ground that that would authorize the naturalization of this class of Asiatic immigrants that are so plentiful on the Pacific Coast. After considerable debate, instead of striking out the word 'white,' it was provided that the naturalization laws should extend to Africans and persons of African descent. Precisely what the view of the gentleman was who revised the naturalization laws, I am unable to determine. He has left out the word 'white' but has kept in the provision in relation to Africans and persons of African descent. The leaving out of the word 'white' would seem to leave the naturalization to extend to every species of alien, but that evidently was not the idea of the gentleman who revised that chapter, because he kept in the provision in relation to Africans and persons of African descent. We have proposed by this amendment to restore the law to just the condition in which it was before the revision was made." (3 Congressional Record, p. 1081.)

Mr. Willard of Vermont then moved that the law be permitted to stand as printed in the Revised Statutes, saying:

"I understand that the Committee on the Revision of the Laws do not make this recommendation upon the merits of the question at all, but simply upon the general principle upon which they are proceeding, to restore this revision as nearly as possible to the condition in which the law was at the time the re-

vision was passed. It occurs to me that there is no need of making this proposed correction of the revision of the laws, unless the House is thoroughly satisfied that the law as it now stands, with the word 'white' stricken out, is not a wise statute. I understand that members from California, and the Pacific Coast, make objection to the naturalization of Asiatics, more especially the Chinese. * * *"

This amendment was opposed by Mr. Page of California, who replied:

"I hope the amendment of the gentleman from Vermont (Mr. Willard) will not prevail. * * * All we ask is that the law be restored as it was prior to the change made by the committee. * * *

"I hope the change as reported from the Committee on the Revision of the Laws will be sustained. When this question was discussed in the Senate some three or four years ago, upon a motion of Mr. Sumner to strike out the word 'white' from the naturalization laws, the Pacific Coast Senators at that time prevailed upon him to consent to amend the naturalization laws so as to include persons of African descent, which would exclude Asiatics."

The speaker thereupon ruled that the amendment was out of order, to which ruling Representative Cox of New York, apparently a member of the Committee on Foreign Affairs, took exception in the following language:

"I naturally asked the question therefore whether there had not been some little carelessness in the revision of the laws by which the *whole of the Asiatic Malayan* race were allowed to come in here and be naturalized. That excited a good deal of attention in the country and especially on the Pacific Coast, and now when gentlemen have a chance to save our committee further trouble, when they can legis-

late on the word red or yellow, they escape the dilemma on a point of order, * * *." (Italics ours.)

(Ibid, 1082.)

From this resume it will be seen that the committee was of the opinion that the effect of the bill was to exclude Asiatics from the privileges of citizenship, an opinion which was apparently acquiesced in by all persons who participated in the debate. The statement made by Representative Poland in behalf of the committee who prepared the bill is clearly relevant. *(Duplex Printing Press Co. v. Deering, supra.)* While the statements of the other members are perhaps not strictly proper to be considered with respect to the meaning of the statute, the fact that the amendment was unsuccessfully sought to be stricken under a unanimous legislative view as to its effect, must be taken as constituting an implied acquiescence by Congress in the statement made by Mr. Poland for the committee.

(2) Executive Construction.

Little need be said with respect to executive construction. The adjudicated cases to which we shall hereinafter refer show that the various Federal executive departments who have been charged with the performance of duties under our naturalization statutes have since 1875 uniformly contended for a strict construction of section 2169 and they have not only opposed the naturalization of the Japanese (*In re*

Saito, 62 Fed. 126), but have also unsuccessfully opposed the naturalization of Hindoos (*In re Mohan Singh,* 257 Fed. 209), of Armenians (*In re Halladjian,* 174 Fed. 834) and Syrians (*Dow v. U. S.,* 226 Fed. 145), and other nationalities who may perhaps be on the border-line under a strict construction of the clause.

The officially reported reports of the Attorney General of the United States support the same conclusion. In an opinion given under date of June 15, 1894, to the Secretary of the Treasury, Attorney General Olney, in concluding that the Chinese were not entitled to be naturalized, said (21 Ops. Atty. Gen., p. 37):

"* * * It is sufficient for the present purpose to say that under section 2169, Revised Statutes, the privilege of naturalization is limited 'to aliens being free white persons and to aliens of African nativity and to persons of African descent'."

Similarly, in 1897, Attorney General McKenna, referring to section 2169, said (21 Ops. Atty. Gen., p. 582):

"It has been held that a native of China is not entitled to become a citizen of the United States under the Revised Statutes as amended in 1875 (*In re Ah Yup,* 5 Saw., 155; 21 Ops. 37)* * *."

(3) Judicial Construction.

Equal brevity with respect to judicial decisions in which section 2169 has been construed since 1875 may be observed. In some thirty cases, to which we

shall hereinafter refer in another connection, all the courts, both state and Federal, have construed section 2169 as prohibiting the naturalization of certain races upon racial grounds alone. They have differed as to the exact meaning of the phrase, and they have not agreed as to the status of particular races, but we have not found an adjudicated case, the decision in which has been officially reported, which dismissed the section as "having no practical significance," as does counsel for petitioners. The only case cited by petitioners in support of this construction is the decision of Judge Lowell in the case of *In re Halladjian,* 174 Fed. 834. We do not so read that decision. While the case contains an elaborate discussion of the meaning of the phrase "free white persons" in early days and concludes that probably it then did not include Asiatics, it concedes that historically and practically the clause has come to mean something different since that time, and Judge Lowell finally admitted petitioner, an Armenian, after expressly finding that Armenians were of Caucasian origin.

It may safely be said, therefore, that the executive department of the Government and practically all of the courts, both state and Federal, have for a period of approximately fifty years refused to follow the construction of the section which petitioners suggest. The court will also note that notwithstanding this uniform action by the judicial and executive departments of the Government, Congress has not only failed to amend the statute, but, upon the contrary,

in the Act of May 9, 1918, (40 Stat. 542) it has recognized the continued existence of the section in the repealing clause to that act found upon page 554 which provides that "nothing in this act shall repeal or in any way enlarge section twenty-one hundred and sixty-nine of the Revised Statutes, except as specified in the seventh subdivision of this act and under the limitation therein defined." It is a familiar rule that in cases of ambiguity, executive construction, when long continued, will be deemed almost conclusive upon the courts.

National Lead Co. v. U. S., 252 U. S. 140;
Jacobs v. Prichard, 223 U. S. 200;
Swigart v. Baker, 229 U. S. 187.

When to this is added the fact that such construction has been uniformly followed by all lower courts without contrary legislative action, it would seem that this court is almost bound to presume legislative acquiescence in such executive and judicial construction.

However, even if we consider this question as an original proposition, the same result must ensue. The Act of 1870 expressly admitted aliens of African nativity or descent, and thereby, if petitioners' construction be adopted, made of no significance the phrase "free white persons," as used in section 1 of the Act of April 14, 1802 (2 Stat. 153), which was the existing naturalization statute in 1870. Under such construction, therefore, the so-called error in the

revision of 1873 by which the phrase was dropped from section 2165 of those Revised Statutes, was, in fact, no error and the amendment of 1875 a useless performance. The fallacy of this argument is conclusively demonstrated by the legislative history of the section to which we have referred.

Indeed, no serious argument is advanced by petitioners in support of this construction other than one of expediency. It is said that the phrase is difficult to interpret, that the courts are not in accord as to its meaning which has resulted in inequality in application, and from these alleged facts the court is asked to judicially repeal the section in order that Congress may, by appropriate legislation, and perchance at the risk of international complications, make its meaning more specific. The statement that the section has led to inequalities is not borne out by the decisions. The courts have had some academic differences with respect to the ethnology of certain races, like the Hindoos and Syrians, but it will be found that they have quite generally resolved all doubts in favor of the alien. It may be safely said, we think, that no race has been rejected that ought properly to be admitted, and that, upon the contrary, we have possibly been too liberal in this respect. The fact that current judicial construction may academically be subject to scientific criticism constitutes no serious objection to the continued application of the construction. We have operated quite successfully for fifty years under a uniform construction of the

section which imports to it some meaning, and it has served to protect considerable sections upon the Pacific slope from the possible domination of Asiatic races. No serious reason is advanced by petitioners why that course should now be abandoned other than to allay the criticism of scholars, a reason entirely insufficient to justify this court in now convicting Congress of enacting meaningless legislation.

The suggestion is made that if this construction be adopted by the court Congress may further amend the statute if it is not satisfied with that construction. Since this suggestion is one of expediency, it may be answered in kind. If the classification which now obtains is not sufficiently definite, then there is no practical classification which can be used other than to specifically designate certain nationalities by name. We think that we need not dwell upon the dangerous possibilities from an international standpoint of any attempt by Congress to expressly designate certain nationalities by name in a statute of this character. There is quite a considerable difference between the mere construction and application of a statute passed fifty years ago and the enactment of a new statute which might be taken by members of other races as proclaiming to the world their alleged inferiority and unfitness to participate in the benefits of American citizenship.

III.

THE JAPANESE ARE NOT FREE WHITE PERSONS WITHIN THE CONTEMPLATION OF SECTION 2169.

Assuming that the court should refuse to hold section 2169 to be "of no significance," there still remains the general question of whether petitioners, who are natives of Japan, are free white persons within the contemplation of the section. This inquiry involves (1) the proper construction of the section, and (2) the status of the Japanese when the statute is construed.

(1) The Proper Construction of the Statute.

The first court which had occasion to consider the section was Circuit Judge Sawyer in the case of *In re Ah Yup,* 1 Fed. Cas. No. 104, decided in 1878, in which it was held that members of the Chinese race were not free white persons within the contemplation of section 2169. Judge Sawyer held in that case that the words "white person" intended to include "a person of the Caucasian race," and he found that it was not used "in a sense so comprehensive as to include a person of the Mongolian race." Accordingly, he denied the petition of a Chinaman to be naturalized. In 1880, Circuit Judge Deady of Oregon, in the case of *In re Camille,* 6 Fed. 256, decided that a Canadian Indian could not be naturalized for the reason that the phrase "free white person" included only members of the Caucasian race. In 1894 Circuit

Judge Colt of the District Court of Massachusetts, in the case of *In re Saito,* 62 Fed. 126, construed the section as "intended to exclude from the privilege of citizenship all alien races except the Caucasian." He accordingly concluded that since a native of Japan was not a Caucasian he was not entitled to be naturalized.

The same construction was adopted by District Judge Morrow in 1895 in the case of *In re Gee Hop,* 71 Fed. 274, in which the petition of a Chinaman was denied. In 1889 the supreme court of Utah, in the case of *In re Nian,* 21 Pac. 993, held an Hawaiian ineligible, stating that section 2169 "authorizes the naturalization of aliens of the Caucasian or white races and of the African races only, and all other races, among which are the Hawaiians, are excluded." In 1897 District Judge Maxey of the Texas court admitted a Mexican to citizenship in a somewhat elaborate opinion which appears to be based largely upon questions of policy and certain treaty provisions of then existing treaties between Mexico and the United States. *In re Rodriguez,* 81 Fed. 337. He did not deny the general correctness of the test applied by Judge Sawyer, in the *Ah Yup* case, but simply held that in so far as Mexicans were concerned the letter of the statute need not be applied for reasons not here material. In 1902 the supreme court of Washington, in the case of *In re Yamashita,* 30 Wash. 234, 70 Pac. 482, refused to grant a license to practice law to a Japanese under a statute which restricted the

right to practice law to American citizens, although the Japanese in question had sought to be naturalized by a court of original jurisdiction. In discussing the meaning of the section that court said (p. 237):

"When the naturalization law was enacted the word 'white' applied to race, commonly referred to the Caucasian race."

The same conclusion was reached by District Judge Hanford in 1908 in the case of *In re Kumagai,* 163 Fed. 922, where a Japanese in all other respects properly qualified, was held to be not entitled to be naturalized. In 1909 District Judge Chatfield, in *In re Knight,* 171 Fed 299, held that under the section "persons of the Mongolian race, either Chinese or Japanese, cannot be naturalized." In the same year Circuit Judge Lacombe, in the case of *In re Balsara,* 171 Fed. 294, accepted the Caucasian theory and admitted a Parsee to citizenship, although he suggested that possibly a *stricter* limitation ought to obtain. In the same year the case of *In re Halladjian,* 174 Fed. 834, was decided by Circuit Judge Lowell, a case which is quoted from quite extensively by petitioners. That case involved the right of certain Armenians to be naturalized. The opinion is voluminous and seems to indicate some doubt in the mind of the court as to the proper test to be applied, although the court offers no substitute for the racial test. In any event, the court found Armenians to be Caucasians, saying: "Armenians have always been ruled as Caucasians and white persons," so that the

decision cannot be cited as repudiating the Caucasian test, although it criticizes it.

In 1909 District Judge Newman in *In re Najour,* 174 Fed. 735, admitted a Syrian upon the express grounds that Syrians were members of the Caucasian race. Similarly in 1910 the Circuit Court of Appeals of the Fourth Circuit, in the case of *Bessho v. U. S.,* 178 Fed. 245, held a Japanese not to be eligible, holding that Mongolians were excluded. Judge Lowell, in *In re Mudarri,* 176 Fed. 465, decided in 1910, admitted a Syrian to citizenship upon the ground that he was a Caucasian, although again expressing his dissatisfaction at the uncertainty in the statute.

Similarly, in 1910, District Judge Wolverton, in *In re Ellis,* 179 Fed. 1002, upon the admission of the government that Syrians were members of the Caucasian race, admitted a Syrian to citizenship, refusing to adopt the contention of the government that section 2169 should be restricted to those persons who belonged to the European races. In *United States v. Balsara,* 180 Fed. 694, decided by the Circuit Court of Appeals of the Second Circuit in 1910 affirming 171 Fed. 294, the court adopted the same test, and having found the Parsees to be Caucasians, admitted one to citizenship. It was said in the decision:

"We think that the words refer to race and include all persons of the white race, as distinguished from the black, red, yellow, or brown races, which differ in so many respects from it. Whether there

is any pure white race and what peoples belong to it may involve nice discriminations, but for practical purposes there is no difficulty in saying that the Chinese, Japanese, and Malays and the American Indians do not belong to the white race."

In 1912 Judge Thompson in the case of *In re Alverto,* 198 Fed. 688, accepted the racial test and denied naturalization to a Filipino. In *In re Young,* 195 Fed. 645, Judge Hanford, following the same authorities, refused to naturalize a German whose mother was a Japanese. This case was afterwards retried by District Judge Cushman in the case of *In re Young,* 198 Fed. 715, where the same conclusion was adopted. In 1913 District Judge Rudkin, in the case of *In re Mozumdar,* 207 Fed. 115, admitted a high caste Hindoo, finding him to be of the Caucasian race, at the same time stating:

"But, whatever the original intent may have been, it is now settled, by the great weight of authority, at least, that it was the intention of Congress to confer the privilege of naturalization upon members of the Caucasian race only."

These authorities constitute substantially all of the reported decisions, at least of the Federal court, between 1875 and 1913, a period of some thirty-eight years. Up to this time all of the courts had adopted and applied the so-called Caucasian test, although Judge Lowell criticized it from a practical standpoint. The influx of immigrants from western Asia, however, seems to have induced the Government to contend for a stricter construction, as appears from

the opinions in the cases of *In re Najour, In re Mudarri* and *In re Halladjian,* where it was considered by the Government that the privilege should be further restricted to those persons who were not only of Caucasian, but also of European origin. This effort of the Government seems to have been unsuccessful until the case of *Ex parte Shahid,* 205 Fed. 812 and *In re Dow,* 211 Fed. 486, 213 Fed. 355, decided by Judge Smith in 1913 and 1914. In the *Shahid* case the court dismissed the petitioner, a Syrian, for naturalization, upon personal grounds, but by way of dictum took occasion to hold that section 2169 included such persons only as were understood in 1790 to be of "European habitancy and descent." This dictum was thereafter made the grounds of decision in the *Dow* case, where the petition of a Syrian, in all other respects properly qualified, was denied solely upon racial grounds. The *Dow* case, however, was subsequently reversed by the Court of Appeals of the Fourth Circuit in *United States v. Dow,* 226 Fed. 145, in which case the court refused to adopt the test followed by Judge Smith and applied the so-called Caucasian test.

In 1917, District Judge Dickinson, in the case of *In re Sadar Bhagwab Singh,* 246 Fed. 496, refused to naturalize a Hindoo, although he found him to be a member of the Caucasian race. In this case he adopted what he designated as the historical interpretation of the phrase. The reasoning of the decision is somewhat obscure, but in substance he re-

futes both the Caucasian test and inquiries made by ethnologists, and construes the phrase "subject to changing conditions" as having the meaning adopted by people generally. This decision does not seem to have been followed by any other court. In 1919, District Judge Bledsoe in *In re Mohan Singh,* 257 Fed. 209, admitted a Hindoo to citizenship. Discussing section 2169, he said:

"With the march of time and growth of knowledge, ethnologically and otherwise, however, it may be inferred, I think, that Congress, in its successive re-enactments of the language, has re-enacted it with its enlarged meaning in mind; and the conclusion of the Circuit Court of Appeals of the Second Circuit, * * * to the effect that 'Congress intended by the words, "free white persons", to confer the privilege of naturalization upon members of the white or Caucasian race only' seems reasonable and just.

"Modern ethnologists use the term 'white' and 'Caucasian' synonymously and interchangeably."

The same conclusion was adopted with respect to Hindoos by District Judge Wolverton in the case of *In re Thind,* 268 Fed. 683, decided in 1920. District Judge Hand, in the case of *In re Narasaki,* 269 Fed. 643, decided in 1919, held a Japanese not to be entitled to be naturalized. In the case of *In re Song,* 271 Fed. 23, decided in 1921, it was held that a Korean was not a white person within the contemplation of the act. In *In re Charr,* 273 Fed. 207, decided by District Judge Van Valkenburgh in 1921, a similar conclusion was reached with respect to Koreans. In construing the statute, it was said:

"The meaning of section 2169 has become so far clarified by late judicial decisions that we are confronted by no embarrassment in determining the question of color in so far as that controls. * * * In accordance with numerous holdings the term includes, as commonly understood, all European races and those Caucasians belonging to the races around the Mediterranean Sea, whether they are considered fair white or dark whites, and though certain of the eastern and southern European races are technically classified as of Mongolian or Tartar origin. Generally speaking, 'free white persons' includes members of the white or Caucasian race as distinct from the black, red, yellow and brown races."

In *Porterfield v. Webb,* 279 Fed. 114, decided December 19, 1921, District Judge Dooling, in an opinion which was concurred in by Circuit Judge Hunt and District Judge Bledsoe, said:

"This limitation excludes three of the great races of the world, the yellow, the brown and the red. And while such exclusion is in a sense arbitrary, it is not without foundation in reason, and has been in effect, except for a brief period, practically during the existence of our government."

Similarly, in *Terrace v. Thompson,* 274 Fed. 841, decided in 1921, District Judge Cushman, in considering the validity of the Washington alien land law, held that a Japanese was not a white person within the contemplation of section 2169. This opinion was concurred in by Circuit Judge Gilbert and District Judge Neterer.

The foregoing authorities represent substantially all of the cases in which the lower Federal courts

have had occasion to construe section 2169 since the passage of the Act of 1875. We have cited thirty decisions. No court has ever adopted the construction contended for by petitioners, i. e., that the section now has no practical significance. Twenty-eight courts have held that section 2169 restricts the right of naturalization to those aliens who are members of races generally regarded as Caucasian, either by direct scientific inquiry, or by centuries of assimilation, which constitutes a substantial equivalent thereto. One court has restricted the scope of the section still further by limiting the clause to the European races; still another has further imposed the limitation of construing the phrase after including those persons generally regarded as white persons. If either of the two latter tests be applied, the petitioners must obviously fail, since the Japanese are not a European race, and neither are they at the present time generally regarded as members of the white race. There remains then the question of whether the Japanese may properly be regarded as Caucasian, either ethnologically or by assimilation and historical recognition. The unanimous verdict of the courts is to the contrary.

2. The Status of the Japanese.

There remains then the question of whether the Japanese can be considered to be persons of the Caucasian race. If they cannot be so considered, the writ should be denied.

a. Judicial Authorities.

The cases upon this subject have already been considered in connection with the general construction of the section. We have found no adjudicated case in which it has been held that a Japanese is a free white person within the statute. The following decisions either directly or by way of dictum have held the contrary:

In re Saito, 62 Fed. 126;
In re Kumagai, 163 Fed. 922;
In re Knight, 171 Fed. 299;
Bessho v. United States, 178 Fed. 245;
In re Young, 195 Fed. 645, 198 Fed. 715;
In re Ozawa, 4 Hawaii Dist. 643;
Terrace v. Thompson, 274 Fed. 841;
Porterfield v. Webb, 279 Fed. 114;
In re Narasaki, 269 Fed. 643.

b. Scientific Authorities.

We are somewhat in doubt as to the position which counsel for petitioners takes upon this phase of the case. In the *Ozawa* brief the position is taken that the Japanese are free white persons of Caucasian origin, even if we accept the controlling judicial construction of the section. Petitioners' main brief, upon the other hand, seems to abandon this theory and to concede that the Japanese are probably primarily of Mongolian origin, a race always classified as the yellow race as distinguished from the white or Caucasian race (Petitioners' Brief, pp.

20 and 21). We assume that it is intended to present both views in the alternative.

While it is perhaps true that the origin of the Japanese race has never been definitely established by ethnologists, it is also true that they are quite generally agreed that the Japanese race proper is not of white or Caucasian root-stock, notwithstanding the quotations in the *Ozawa* brief from the unpublished letters and addresses of one David Munro. Speaking generally, it may be said that the scientists have reached the conclusion that the islands of Japan were originally inhabited by a race of aborigines known as the Ainos, whose origin is practically unknown but who appear to have had many of the physical characteristics of the Caucasians. They are also agreed that at a somewhat prehistoric age these islands were invaded by the ancestors of the present Japanese, who appear to have been in part Mongolian and in part Maylay. After centuries of warfare the Ainos, like the American Indian, have been generally exterminated, so that in 1906 it was said by Professor Baelz, a professor of the Imperial Japanese University from 1876 to 1902, that there were then in Japan not over 17,000 remaining survivors of this race.

Smithsonian Institute Reports, 1907, p. 526.

The overwhelming consensus of scientific opinion, however, is that there is a great difference between the Ainos and the Japanese; for instance, Pro-

fessor Baelz states that the Ainos will soon disappear as a race "because they will be gradually absorbed by the Japanese." Likewise, Professor Katsuro Hara, of the Kyoto Imperial University, in his Introduction to the History of Japan, in discussing the Ainos says (p. 30):

"The only thing virtually agreed to by all investigators engaged in ethnological inquiry concerning Japan, is that the Ainu is the aboriginal stock, and that the Japanese so-called belongs to a stock different from the Ainu."

The following excerpts illustrate the result of scientific investigation up to the present time:

Encyclopaedia Brittannia (1910) 11th Edition:

Under title "Ethnology" divides mankind into three primary divisions: Caucasic, Mongolic and Negroid, and specifically includes Japanese under Mongolic division.

Under the title "Japan", it is said that the Japanese race is made up of (1) Ainos; (2) Manchu-Koreans; (3) Monguls, and (4) Malays. Regarding the Ainos, says:

"These people—the Ainu—are usually spoken of as the aborigines of Japan. They once occupied the whole country, but were gradually driven northward by the Manchu-Koreans and the Malays, until only a mere handful of them survived in the northern island of Yezo. * * * The Ainu suggests much closer affinity with Europeans than does any other of the types. * * * It is not to be supposed, however, that these traces of different elements indicate any lack of homogeniety in the Japanese race.

Amalgamation has been completely effected in the course of long centuries, and even the Ainu, though the small surviving remnant of them now live apart, have left a trace upon their conquerors."

Encyclopaedia Americana (1920) p. 549:

Under title "Ethnology" outlines the following enthnographic scheme: European, or white; African-Negro, or black; Asiatic-Mongolian or yellow; American or coppery and Oceanic or dark.

Regarding the Mongolian race (p. 552) it says:

"The Asian, or Mongolian race, is made up of two divisions—the Sinitic and Sibiric. * * * The Sibiric branch of this race is largely located north of the mountains of Central Asia ranging with the Arctic circle from the Pacific to the Atlantic Ocean. * * * The Japanese and Koreans constitute the Japanese group."

Under the title "Japan" at page 628, Shogoro Tsuboi, professor of ethnology in the Imperial University, Tokyo, speaks of a prehistoric people called by the later Ainus "Koropokguru" from which the Eskimos and Aleuts sprang, and continues:

"* * * The Japanese language is closely related to Korean. In Japanese manners and customs some likeness to those of Korea and Malay are found. It is quite probable that the Ainu, Malay and continental elements are the chief, though not necessarily, the only, constituents of the Japanese."

Nelson's Loose-leaf Encyclopaedia, under title "Japan", at page 567, says:

"Although with regard to civilization, Japan has made great and substantial progress, the Jap-

anese are nevertheless still an Asiatic nation. *Language and anthropology show that the predominant element in the Japanese race is Mongol.*"

New International Encyclopaedia (1915) p. 584, under title "Japan-Ethnology", says:

"The largest factor in the production of the Japanese is to be traced back to the Mongolian race of the adjacent continent, a view confirmed by the physical characteristics of a considerable portion of the population at the present time. * * * There are recognizable three physical types—an Ainu type, chiefly characteristic of North Japan; a Manchu-Korean in the regions nearest Korea; and a Malayo-Mongolic in the center and east. The Korean-Manchu type seems to go back, like the primitive Chinese, to a Mongolian ancestry with a strain of proto-Caucasian blood, while the Ainus are perhaps allied to the most primitive Caucasians; but such opinions must be accepted with caution."

Deniker, "The Races of Man," (1901) pp. 371-372:

Divides Asia into five races: (1) Dravidian; (2) Assyroid; (3) Indo-Afghan; (4) Ainu and (5) Mongolian. Geographically speaking, he says Northern Asia is composed of (1) Yaniseians or Tubas; (2) Palaesiatics and (3) Tunguses. The Palaesiatics, he says, include the Ainus, and he does not specify that they were "white." He says:

"The Ainus who are classed among the Palaesiatics, inhabit the north and east of the island of Yezo, the south of Saghalien, and the most southern islands of the Kuriles. They form a group by themselves, differing from all other peoples of Asia. Their elongated heads, their prominent superciliary

ridges, the development of the pilous system, the form of the nose, give to them some resemblance to the Russians, the Todas and the Australians, but other characters (coloration of the skin, prominent cheek-bones, short stature, frequent occurrence of the *os japonicum*, etc.) distinguish them from these peoples and affords grounds for classing them as a separate race. * * * It is calculated that there are about 18,500 Ainus (of whom 1,300 are in the island of Saghalien) at the present time; their number at Yezo has remained stationary for several years. * * * Their religion is pure animism. * * * The Ainus, like most Asiatic peoples, such as the Giliaks, Tunguses, etc., have a special veneration for the bear. * * * The Ainu language is agglutinative, and has no analogy with any known language."

At page 387 this author says:

"The fine types of Japanese which may be chiefly observed in the upper classes of society, is characterized by a tall slim figure, a relative dolichocephaly, elongated face, straight eyes in the men, more or less oblique and Mongoloid in the women, thin, convex or straight nose, etc. The coarse type common to the mass of the people is marked with the following characters: a thickset body, rounded skull, broad face with prominent cheek bones, slightly oblique eyes, flattish nose, wide mouth.

"These two types have been the result of crossings between Mongol sub-races and Indonesian or even Polynesian elements. The influence of the Ainu blood is shown only in Northern Nippon."

Bettany, "The World's Inhabitants," 3rd Ed. (1892) p. 384, says:

"Japan includes the flower of the Mongolian people. * * * We can look back to a period when tribes resembling the remaining Ainos of Yezo, inhabited such parts of the islands as were redeemed

from forests. They were gradually driven northwards by the ancestors of the present Japanese. That these were in part of Chinese origin cannot be doubted; but how far the Manchus, Coreans, Malays and Papuans may have a claim to share in the Japanese ancestry, cannot be settled."

"Dictionary of Races or Peoples" (Report of Immigration Committee, Senate Doc. 662, 61st Cong., 3rd Session):

Adopts Blumenbach's classification of mankind into five races. The primary classification, it is pointed out, is physical or somatological, and the treatise then proceeds to subdivide each race into groups based on linguistic differences, saying:

"The practical arguments for adopting such a classification are unanswerable."

It then by means of a table shows how the anthropologists and ethnologists have divided the races:

Brinton divides mankind into five races, and includes Japanese and Korean under the Sibiric branch of the Mongolian.

Keane makes four classifications, combining the Malay and Mongolian as one.

Blumenbach makes the five commonly used divisions.

Deniker on the other hand had twenty-nine classifications.

Huxley's divisions were Negroid, Australoid, Melanchroid, Xanthrochroid and Mongoloid.

At page 85 this work says:

"With the exception of the 'Arctic group,' the Japanese and Koreans form the eastermost group of the great Sibiric branch, which with the Sinitic branch (Chinese, etc.,) constitutes the Mongolian race. As was said in the article on Chinese, the Japanese and Koreans stand much nearer than the Chinese, especially in language, to the Finns, Magyars and Turks of Europe. The language of all these peoples belongs to the aggultinative family, while Chinese is monosyllabic. Although many people may mistake a Japanese face for Chinese, the Mongolian traits are much less pronounced. The skin is much less yellow, the eyes less oblique. The hair, however, is true Mongolian, black and round in section, and the nose is small. These physical differences no doubt indicate that the Japanese are of mixed origin. In the South there is probably a later Malay admixture. In some respects their early culture resembles that of the Philippines of today. Then there is an undoubted white strain in Japan. The Ainos, the earliest inhabitants of Japan, are one of the most truly Caucasian like people in appearance in Eastern Asia. They have dwindled away to less than 20,000 under the pressure of the Mongolian invasion from the mainland, but they have left their impress upon the Japanese race."

Article by Captain F. Brinkley entitled "Primeval Japan," in Annual Report of Smithsonian Institute, year ending June 30, 1903:

"The student must be content to regard the annals of primeval Japan as an assemblage of heterogeneous fragments from the traditions of South Sea Islanders, of Central Asian tribes, of Manchurian Tartars and of Siberian savages, who reached her shores at various epochs * * *.

"The first were the Koro-pok-guru or cave men. The second were the Ainu, a flat-faced, heavy-jawed, hirsute people who completely drove out their predecessors and took possession. The Ainu of that period had much in common with animals. They burrowed in the ground for shelter; they recognized no distinctions of sex in apparel or of consanguinity in intercourse; they clad themselves in skins; they drank blood; they practiced cannibalism. * * * They * * * unceasingly resisted the civilized immigrants who subsequently reached the islands, they were driven northward by degrees and finally pushed across the Tsugaru Strait into the Island of Yezo. The long struggle, and the disasters and sufferings it entailed, radically changed the nature of the Ainu. They became timid, gentle, submissive folk; lost most of the faculties essential to a survival in the racial contest, and dwindled to a mere remnant of semi-savages, incapable of progress, indifferent to improvement, and presenting a more and more vivid contrast to the energetic, intelligent and ambitious Japanese.

"But these Japanese—why were they originally? Whence did the three or more tides of immigration set which ultimately coalesced to form the race now standing at the head of Oriental peoples * * *? Kampfer persuaded himself that the primeval Japanese were a section of the builders of the Tower of Babel. Hyde-Clark identified them with the Turano-Africans who traveled eastward through Egypt, China and Japan. Macleod recognized in them one of the lost tribes of Israel. Several writers have regarded them as Malayan colonists. Griffis was content to think that they are modern Ainu and recent scholars incline to the belief that they belonged to the Tartar-Mongolian stock of Central Asia.

"The theory which seems to fit the facts best is that the Japanese are compounded of elements from Central and Southern Asia. * * * The Asiatic

colonists arrived via Korea. But they were neither Korean nor Chinese. * * * Their birthplace was somewhere in the north of Central Asia. As for the South Asian immigrants, they were drifted to Japan by a strange current called the 'black tide' which sweeps northward from the Philippines."

Dr. E. T. Hamy in an article entitled "The Yellow Races," appearing at page 505, Smithsonian Reports (1895), says:

"The Koreans and Japanese belong without contradiction, at least up to a certain point, to the great mass of peoples of the yellow race. * * * It can hereafter no longer be doubted that the population is connected by bonds of kinship with its neighbors on the yellow continent. * * * The Malays, whose fleets ravaged the coasts of Tsiampa as late as the eighth century * * * have left behind numerous traces of their intervention.

"One last national element, which has remained very modest in its influence, because it was driven out, with a kind of repugnance, by the Japanese is the Ainu, the hairy race of Kuriles, of Sakhalin and of Yezo. I have told you what little I know of these singular islanders, whom for the moment I am utterly unable to classify. The Ainos are, on the average, akin to the Chinese by their cephalic index, and I have provisionally placed them between the Chinese and the Eskimo." (Italics ours.)

An article by Dr. E. Baelz, professor of Imperial University, Tokyo, entitled "Prehistoric Japan," appearing in Smithsonian Reports (1907) is enlightening. This author distinguished in Japan three essential elements: (1) the north or true Mongolian; (2) the south or Malayan and (3) the Aino, and adds:

"Probably there is an admixture of Hindu or foreign blood in many Malays."

He vigorously combats the doctrine that the Japanese are widely different from the Chinese, saying:

"Investigators were too much influenced by outward appearances, especially by dress and methods of wearing the hair. * * * To contradict this I have the testimony of any number of Japanese and Koreans that they themselves cannot distinguish one from the other if costume and hairdressing are the same. * * * Therefore I cannot understand how Donitz can say 'the Japanese are so different at first sight from the Mongolians who inhabit the neighboring mainland that it is hard to conceive how there could be any direct connection between them.'"

Regarding the Ainos this author says:

"They will soon disappear as a race, not, however, because they will be stamped out by encroaching civilization, but because they will be gradually absorbed by the Japanese. Intermarriage is now of almost daily occurrence. * * * The Japanese type generally prevails among these halfbreeds."

A number of historical writers are of more than passing interest. K. C. Latourette, in "The Development of Japan" (1918) p. 18:

"The Japanese of today are a mixed race, and are the result of the coalescence of several migrations. * * * The Manchu-Korean and Malay stocks predominate, with the balance in favor of the latter, but there are as well traces of infusion of other blood, part of it Mongol, part of it still undetermined. Some enthusiasts have even seriously claimed to have found an Indo-European admixture. In language the Japanese more nearly resemble some

of the groups of northern and central Asia, and especially Korea, but there are also likenesses to the Malay tongues."

"An Introduction to the History of Japan," by Katsuro Hara, (1920) says:

"Who are the Japanese? We are almost at a loss to decide to which assertion we can most agreeably give out countenance without the risk of receiving an immediate setback. So I shall be content to state here only those hypotheses, which may be considered safe, although they may not rise above the level of conjecture."

He leaves in doubt the question as to the origin of the Ainu, saying:

"Even the supposition that the Ainu belongs to the Aryan stock cannot be rejected as quite a worthless speculation."

Continuing, he says:

"We have here designated the vanquishers of the Ainu by the name of Japanese. * * * If it is most probable that the Japanese is a heterogeneous race, then what are the elements which constitute it? * * * Summing up I cannot but think that the prehistoric immigrants into our country from the South were by no means a negligible factor in constituting the island nation, though the majority of immigrants might have come from the nearest continental shores, and in this majority it is not necessary to exclude the Chinese altogether."

"A History of Japan," by James Murdock (1910), page 35, says:

"The inhabitants of the Luchus, of Satsuma and the rest of the Southern Kyusku and the peoples of

the old Hans in Korea are, or were, of the same stock —either Malay or Indonesian. And just as the people of the three Hans supplied the basic element in the Korean language, so those of Luchu and Kyushu have furnished the element in the tongue of modern Japan. Furthermore they have furnished Japan with her Imperial house and with the greater part of her aristocracy and ruling caste."

He then points to the presence of another class of inhabitants in the state of Idzumo, presumably from the continent, and of Mongolian origin, and continues:

"The combination of this branch of Kyushu, Kumaso and the Idzumo men proved irresistible; they pushed their conquests to eastward along both shores of the inland sea and ultimately established a strong central state in Yamato at the expense of the Ainu."

Brinkley's "Japan" (1904) at page 70, says:

"By the Japanese themselves it is stoutly affirmed that not the smallest mark of consanquinity can be traced between them and the Ainu or Yezo tribe. Unquestionably the languages of the two have nothing in common and so far as outward appearance is concerned the dissimilarity is conspicuous. Nevertheless, certain German anthropologists have placed on record their opinion that the Ainu are Mongolian."

Brinkley then proceeds to disprove this and says:

"We may accept it as an established fact that the Japanese and the Ainu have no affinity whatever."

He proceeds:

"Western ethnologists are tolerably agreed that Jimmu (first emperor) *and his followers were Mongolian.* There have been attempts to identify them with the lost tribes of Israel; with the Aztecs and with other peoples of the Occident. In Japan there is a belief that they were Manchurians; that is to say, a race which originally emigrated from a remote part of India, a race distinct from the Chinese, of which some settled in Manchuria, spread thence to the northeast China and finally passed to Japan. It must be agreed for the moment to leave the problem partially unsolved; noting, however, that though the Japanese Shizoku cannot be absolutely identified with the Mongolian of today, the differences are not so great as to be incapable of reference to the modifying influences of environment acting through long centuries. At all events we may conclude that the final immigrants, Jimmu and his followers of the so-called Takana-no-para folk, found on their arrival a Malayan people inhabiting the southern and central parts of Japan, and an arctic tribe, the Ainu, living in the north, and that while they amalgamated with the former, they drove out the latter, treating them as a wholly inferior race, the result being that whereas the Japanese proper show plainly enough the blending of the Mongolian and Malayan types, they show no affinity whatever with the Ainu." (Italics ours.)

"A Handbook of Modern Japan," by E. W. Clement, (1904), at page 44, says:

"It is well known that the Japanese are classed under the Mongolian (or yellow) race. They themselves boastfully assert that they belong to the 'golden race,' and are superior to Caucasians who belong to the 'silver race'! As Mongolians they are marked, not only by a yellowish hue, of many shades from the darkest to the lightest, but also by straight black

hair (rather coarse), scanty beard, rather broad and prominent cheek bones, and eyes more or less oblique. Some think that the Japanese people show strong evidence of Malay origin, and claim that the present Emperor, for instance, is of a striking Malay type. It is not impossible that Malays were borne in the 'Japan Current' northward from their tropical abodes to the Japanese islands; but there is no historical record of such movement. Therefore the best authorities like Rein and Baelz, do not acknowledge more than slight traces of Malay influence." (Italic ours.)

At page 45 of this work is found the following note:

"'Various Impressions' is the title of an address delivered at a meeting of the Imperial Society by Dr. Nitobe. * * * Dr. Nitobe gave an account of his travels in the South Pacific. He visited Java, many other islands, and Australia. At Java he felt persuaded that an eminent French ethnologist, who not long ago said that, as the result of much investigation, he had come to the conclusion that the Japanese race was 6/10 Malay, 3/10 Mongolian and 1/10 mixed, was right. Among the mixed element there was an Aryan element which came from India and a negrito element. 'During my travels in the South Pacific Islands I was repeatedly struck by the similarity of Malay customs to our own. In the structure of their houses even this was very manifest. * * *'"

"The Japan Year Book," 1913-14, printed in English at Yokahama, at page 13, says:

"The origin of the Japanese is obscure * * *. The following are the principal theories advanced:

"1. That the Japanese owe a good deal of their composition to the Ainu, the aborigines of Japan, who

originally entered the country from the mainland of Siberia. This theory has now been practically abandoned, in view of the researches of Baelz, Aston, Batchelor and others.

"2. That the Japanese are originally of Malay stock.

"3. That the Japanese are a mixture of Tartar-Mongolian races from Central and Southern Asia, a theory supported by Brinkley, Griffis, Max von Brandt and others.

"4. That the Japanese are purely Mongols. This theory emanates from Baelz and Rein, and is supported by Chamberlain.

"5. That the Japanese are a mixture of a Caucasian, Negrito, Mongolian and Semitic, the negrito elements being originally found in Japan previous to the immigration from the mainland of Asia, in which all authorities believe. This theory is based on the researches of Monro.

"The sum of all the above theories is that the Japanese race consists of a mixture of races all Asiatic in origin, and that therefore the Japanese are an Asiatic race.

"Recently a Russian student has advanced the theory that the Japanese have in part blood of the Ugrian stock, and are similar to the Finns and certain namadic tribes of North and Central Russia. Savoff, the author of this theory, bases his belief principally on the evidence of language."

At page 15 it is said:

"The Ainus are a distinct race from the Japanese, and there has been, comparatively speaking, little intermarriage between the two races.

"Undoubtedly they are a dying race, and the years cannot be many before they will be entirely wiped from the face of the earth. For the present they are mostly interesting as the remains of a purely barbaric race."

"The Japanese Nation," a noted and widely quoted work by Inazo Nitobe (1912) says, in part:

"There seems as yet little philological affinity established between the continental peoples and the Japanese. In this respect a relationship with the Malay race promises to be closer, though as yet no definite conclusion is reached.

"But before the Malays or the Chinese reached the shore of Japan, a hairy race of northern blood, large in numbers, and known as the Ainu, seem to have held the entire country in possession."

He then dwells upon the conflict of authority as to the exact origin of the Japanese, concluding:

"Suppose we could obtain an average for the present generation, so unstable are human types—as Boas, Bolk and other ethnographers have demonstrated—that a few generations hence will show a marked difference in Japanese anatomy. * * * It has long been and probably still is, no easy task to assign a definite place to the Japanese in the general scheme of ethnic classification. We used to be dumped into the heap of linguistic non-conformists, under the name of Turanian. * * * The Japanese, as they are, according to the carefully compiled table of Professor Amos W. Butler, belong to what he calls the Sibiric branch of the Asiatic race, and with the Koreans constitute the Japanic stock, quite apart from the Chinese, Mongolic and the Tartaric. Perhaps this classification is the most precise."

This author means the Sibiric branch of the Mongolian race as distinguished from the Sinitic branch to which the Chinese, Mongols and Tartars belong.

He says further:

"Philologically Japanese is a forlorn and solitary orphan, that can claim no relationship either lateral or collateral, with any other language."

Basing his remarks upon researches by Baelz, Professor David Murray, in "The Story of Japan" (Famous Nations) at page 29, says the Ainos belong to the northern group of Mongolians who inhabit the regions about Kamtschatka and adjacent parts of Siberia. He says the later Japanese belong to two distinct immigrations, the earlier one to the province of Izumo from Korea, belonging to a rougher and more barbarous tribe of the Mongolian race, and the later one to the island of Kyusku, either from Korea or through Formosa or the Ryuku islands. The second immigration came from a more cultured tribe of the Mongolian race, although there is some probability that they were of Malay origin. The author takes the view that both immigrations were of Mongolians, saying:

"That they came from the same race is evident from their understanding of the same language, and having habits and methods of government which were not a surprise to the newcomers, and in which they readily cooperated."

As the court will observe from the resume made in the "Japan Year Book of 1913," the only reputable authority who ascribes Caucasian origin to the Japanese is Monro, and even he appears to concede the existence of marked Mongolian and Malay strains. Mr. Monro's speculations will be found set forth quite extensively upon pages 58 to 67 of the *Ozawa* brief. They find little or no support in any of the standard authorities but are based almost entirely upon sim-

ilarity in language with the Polynesians and certain prehistoric ruins.

However, for the purpose of this action it is not necessary for the court to definitely pass upon the correctness of the theories of Dr. Monro or any of the other scientists. Whatever may have been the origin of the Japanese in prehistoric times, they have for a period of over 2,000 years constituted a homogeneous race which has been regarded as yellow or Mongol by all the European races since we first had any knowledge of the existence of Japan. The debates in Congress to which we have referred clearly indicate an attempt to exclude the Asiatics or yellow races. Popular opinion has always followed that view, and it has been further supported for the past fifty years by an almost unbroken line of judicial authorities. Since the problem before the court is one of statutory construction and not of scientific inquiry, it is submitted that that view should be adopted, especially when it finds support in at least the numerical weight of scientific authority.

IV.

THE JAPANESE ARE NOT ASSIMILABLE.

Beginning upon page 67 of the *Ozawa* brief under the head "The Japanese Are Assimilable," there is found a discussion of the legislative policy of admitting the Japanese to citizenship and a tribute to the virtues of the members of that race. Since the question is merely one of statutory interpretation and

not of legislative expediency, we are somewhat in doubt as to whether we may, with propriety, discuss this question. Since, however, the discussion is invited by petitioners, and the decision in the case is of the gravest importance to the citizens who reside upon the Pacific Coast and in the Territory of Hawaii, we feel that we should not permit this statement to go unchallenged. The conclusion of counsel upon this point is based upon certain statistics relating to crime taken from the Report of the Governor of Hawaii to the Secretary of the Interior in 1916 and an unpublished paper said to have been written by one M. M. Scott, the principal of a high school in the city of Honolulu. This argument, we think, is based upon an entire misconception of the question or of the things which are necessary in order to permit assimilation between persons of different races. The assimilability of a foreign race is not established by demonstrating their theoretical fitness for citizenship because the problem is a practical one which cannot be solved by applying rules of morality. The very virtues which are referred to in the brief as characteristic of the Japanese race, such as their industry and economic efficiency, are a not inconsiderable factor in the prevention of any successful assimilation when added to the racial difference between the Japanese and the citizens of this country. As was well said by Professor Robert E. Park of the University of Chicago in his Introduction to "The Japanese Invasion," by J. F. Steiner:

"It has been assumed that the prejudice which blinds the people of one race to the virtues of another, and leads them to exaggerate that other's faults, is in the nature of a misunderstanding which further knowledge will dispel. This is so far from true that it would be more exact to say that our racial misunderstandings are merely the expression of our racial antipathies. Behind these antipathies are deep-seated, vital, and instinctive impulses. These antipathies represent collision of invisible forces, the clash of interests, dimly felt but not yet clearly perceived. They are present in every situation where the fundamental interests of races and peoples are not yet regulated by some law, custom, or any other *modus vivendi* which commands the assent and the mutual support of both parties. We hate people because we fear them; because our interests, as we understand them at any rate, run counter to theirs."

The same author in an article entitled "Racial Assimilation in Secondary Groups," American Journal. Soc., March, 1914, p. 610, said:

"The chief obstacles to the assimilation of the Negro and the Oriental are not mental but physical traits. It is not because the Negro and the Japanese are so differently constituted that they do not assimilate. If they were given an opportunity the Japanese are quite as capable as the Italians, the Armenians, or the Slavs of acquiring our culture and sharing our national ideals. The trouble is not with the Japanese mind but with the Japanese skin. The Jap is not the right color. The fact that the Japanese bears in his features a distinctive racial hall mark, that he wears, so to speak, a racial uniform, classifies him. He cannot become a mere individual indistinguishable in the cosmopolitan mass of the population, as is true, for example, of the Irish and to a lesser extent of some of the other immigrant races.

The Japanese, like the Negro, is condemned to remain among us an abstraction, a symbol, and a symbol not merely of his own race but of the Orient and of that vague, ill-defined menace we sometimes refer to as the 'Yellow Peril.' This not only determines to a very large extent the attitude of the whole world toward the yellow man, but it determines the attitude of the yellow man to the white. It puts between the races the invisible but very real gulf of self-consciousness."

Mr. J. F. Steiner, in his work entitled "The Japanese Invasion," which is quite sympathetic towards the Japanese, in chapter 10 reaches the conclusion that there can never be a true assimilation so long as the present physical difference exists between the Caucasian and the Japanese, saying (p. 180):

"It is not a question whether their physical characteristics are attractive or repulsive to Americans. The problem is not lessened by the fact that the color of the Japanese is hardly more pronounced than is that of the people of southern Europe. Even when due allowance is made for their changes in physical appearance brought about by their reaction to their new environment—changes in the cast of countenance and in the peculiar mannerisms which play an important part in intensifying racial distinctions—the fundamental fact still remains that their physical type marks them out as Orientals wherever they are, and suggests to us all the undesirable connotations that are bound up with the word 'Asiatics'."

We might multiply authorities to establish the proposition that there can be no real assimilation of an alien race unless it is accompanied by a social assimilation which destroys the marked physical char-

acteristics which differentiate races. It is unnecessary to do so, because the judicial knowledge of the court with respect to the problem of the Negro, of the Indian and the Chinaman in the United States will sufficiently demonstrate this fact.

Social assimilation can only be accomplished by inter-marriage, since that is the only way in which the physical characteristics which create a racial prejudice can be obviated. Few authorities, even those most favorable to the Japanese, are willing to admit the possibility of any general inter-marriage between the Japanese and the Caucasian race. As early as 1892 Herbert Spencer, in a private letter written to Baron Keneko, which was first made public in the *London Times* of January 22, 1904, said:

"To your remaining question respecting the intermarriage of foreigners and Japanese, my reply is that, as rationally answered, there is no difficulty at all. It should be positively forbidden. It is not at root a question of social philosophy. It is at root a question of biology. There is abundant proof, alike furnished by the intermarriages of human races and by the interbreeding of animals, that when the varieties mingled diverge beyond a certain slight degree *the result is inevitably* a bad one in the long run. I have myself been in the habit of looking at the evidence bearing on this matter for many years past, and my conviction is based on numerous facts derived from numerous sources. * * * By all means, therefore, peremptorily interdict marriages of Japanese with foreigners."

Lawton, in Volume 2, page 761, in his work on "Empires of the Far East," reaches the same conclusion, stating:

"For it is indisputable that the marriage of a western woman to a Japanese lowers her status in society and exposes her to the indignities that are inseparable from the operation of the Japanese social system."

Even Dr. Gulick, for many years an ardent advocate of the virtues of the Japanese, in his book "The American Japanese Problem," states:

"It may be set down as a universal rule that intermarriage of races should follow, not precede, social assimilation."

The court will find that subject quite thoroughly considered by Mr. Steiner in chapter 4 of his work entitled "The Japanese Invasion."

Reference might likewise be made to the report of the hearings held before the House Committee on Immigration and Naturalization with respect to the Japanese problem held on the Pacific Coast in July, 1920, where even the Japanese admitted the practical impossibility, at least at the present time, of any general intermarriage between the races, although they insisted that there were no biological objections.

Without intermarriage there can be no social assimilation, and without social assimilation there can be no real assimilation. The refusal of a numerically dominant race to socially assimilate with an alien population must inevitably prevent the latter race from ever becoming assimilated, because assimilation is an evolutionary and educational process which can never be accomplished without mutual cooperation

between the races. This is more particularly true in cases where the alien race is of high mentality for the reason that they are not content to accept a subordinate status with which a partial assimilation may somtimes be accomplished.

It is no reflection upon the Japanese to say that they will never be assimilated until socially recognized. Refused social recognition, it is inevitable that they will continue to be Japanese in thought and action, and that they will not accept American ideas or recognize substantial obligations to the American Government, because the human mind generally determines abstract things by concrete facts. Whoever may be at fault, therefore, the fact cannot be successfully controverted that the Japanese have not, in fact, been assimilated, and that if social recognition be required as a condition precedent, they will probably never be assimilated. The hearings before the House Committee, *supra,* demonstrate this quite conclusively. These hearings show the general consensus of the mass of the people who come in contact with large numbers of the Japanese to regard them purely as Asiatics, and not as Americans, either actual or potential. It is true that many witnesses, notably educators and clergymen, criticize this attitude, while others think that the Japanese are economically necessary to the development of our agricultural resources. Scarcely any were found, however, who denied the inescapable fact that a social and racial gulf exists between the two races which has steadily in-

creased in proportion to the increase in our Japanese population. It is unnecessary for us to analyze the testimony of those who oppose the further immigration of the Japanese or to determine whether their apprehensions were justified in fact. The court will find those conclusions set forth in the report of the committee. In the final analysis, the problem is a practical one which cannot be answered by assuming all men to be perfect. The granting of political equality, while desirable in the case of a race capable of assimilation, in the case of a race not so capable, simply intensifies the problem. The history of the South after the right of suffrage was conferred upon the negro is ample proof of this fact. Facts are stubborn and unescapable, and they are not met by showing that from the standpoint of morality they should not exist. It is unnecessary for us here to attempt to apportion the blame for this prejudice, because the fact would remain the same, even though we should absolve the Japanese from all responsibility. If the decision of the case should turn upon the possibility of the successful assimilation of the Japanese, the writ should be denied, because the Japanese will never be assimilated in this country, at least in our generation.

We do not mean by the foregoing to admit that there is no real objection to Japanese assimilation other than racial prejudice and economic jealousy upon the part of the whites. The hearings had before the House Committee revealed many other factors which might be worthy of serious consideration

by a legislative body. We feel, however, that we have gone as far as is proper in this respect, indeed even farther than we would otherwise have done had the point not been suggested in the *Ozawa* brief.

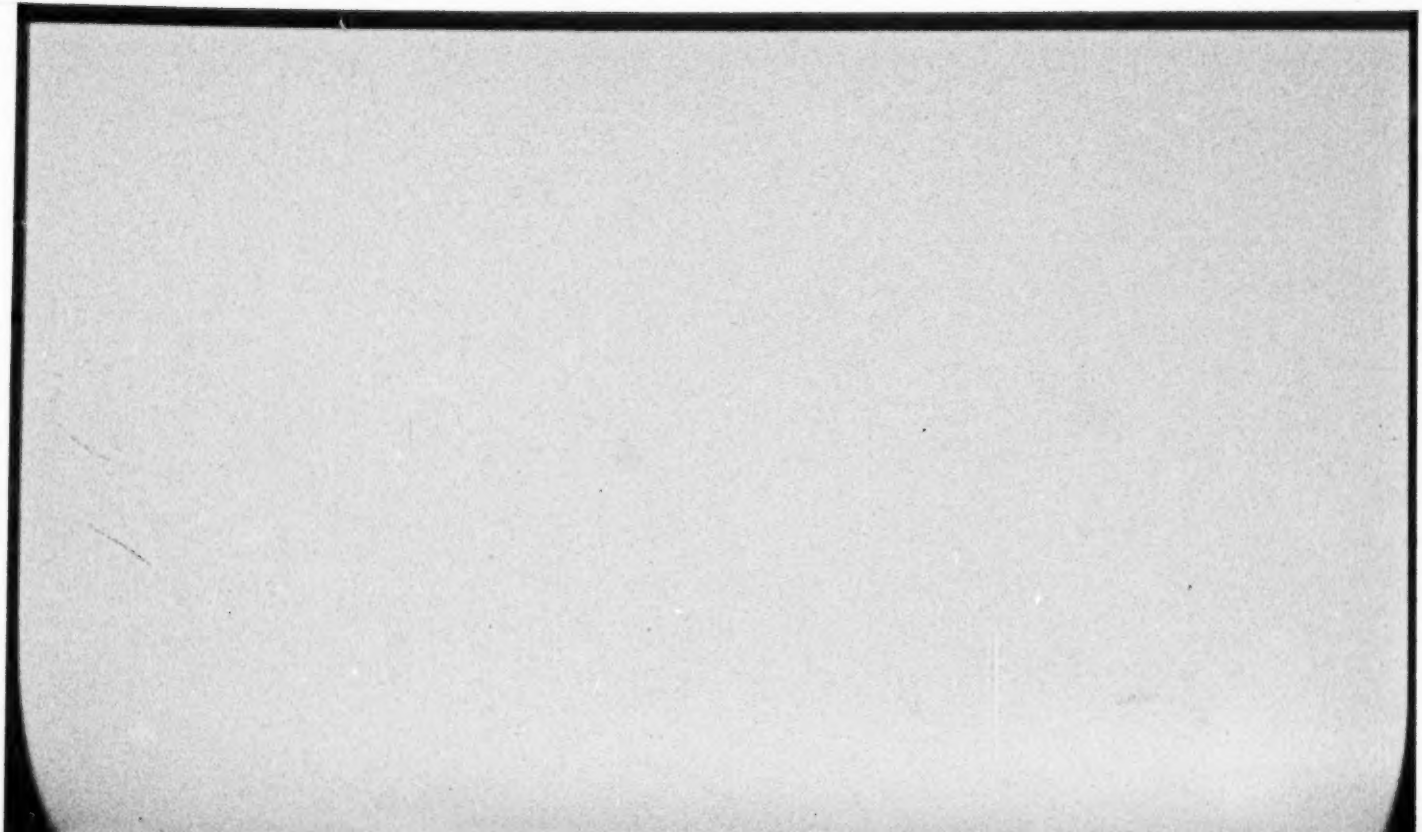
The argument is also made that it would be presumed that the superior court of Pierce county found these petitioners to be Ainos, and therefore of the Caucasian race when it naturalized them. There are three answers to this contention: (1) the pleadings admit the petitioners to be Japanese, and Ainos have always been recognized as a different race than the Japanese, although owing allegiance to that nation, (2) the origin of the Ainos has never been established, and since they owe allegiance to the Japanese, their status must be considered the same, and (3) the record does not include the order of naturalization made by the superior court of Pierce county, and since that judgment was declared void by the highest court of the state, if there is any presumption it must be in support of the conclusion of the latter court where the record is incomplete.

The judgment should be affirmed.

Respectfully submitted,

L. L. THOMPSON,
Attorney General of Washington,
Attorney for Respondent.

E. W. ANDERSON,
of Counsel.



SUPREME COURT OF THE UNITED STATES.

No. 177.—October Term, 1922.

Takuji Yamashita and Charles Hio Kono, Petitioners, *vs.* J. Grant Hinkle, as Secretary of State of the State of Washington.	On Writ of Certiorari to the Supreme Court of the State of Washington.

[November 13, 1922.]

Mr. Justice Sutherland delivered the opinion of the Court.

This case presents one of the questions involved in the case of *Takao Ozawa* v. *The United States*, this day decided, viz.: Are the petitioners, being persons of the Japanese race born in Japan, entitled to naturalization under Section 2169 of the Revised Statutes of the United States?

Certificates of naturalization were issued to both petitioners by a Superior Court of the State of Washington prior to 1906, when Section 2169 is conceded to have been in full force and effect.

The respondent, as Secretary of State of the State of Washington, refused to receive and file Articles of Incorporation of the Japanese Real Estate Holding Company, executed by petitioners, upon the ground that, being of the Japanese race, they were not at the time of their naturalization and never had been entitled to naturalization under the laws of the United States and were therefore not qualified under the laws of the State of Washington to form the corporation proposed, or to file articles naming them as sole trustees of said corporation. Thereupon petitioners applied to the Supreme Court of the State for a writ of mandamus to compel respondent to receive and file the Articles of Incorporation, but that court refused and petitioners bring the case here by writ of certiorari.

Upon the authority of *Takao Ozawa* v. *The United States, supra*, we must hold that the petitioners were not eligible to naturalization,

and as this ineligibility appeared upon the face of the judgment of the Superior Court, admitting petitioners to citizenship, that court was without jurisdiction and its judgment was void. *In re Gee Hop,* 71 Fed. Rep. 274; *In re Yamashita,* 30 Wash. 234.

The judgment of the Supreme Court of the State of Washington is therefore

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.